No. 15-577

Title:	Trinity Lutheran Church of Columbia, Inc., Petitioner v. Carol S. Comer, Director, Missouri Department of Natural Resources
Docketed:	November 5, 2015
Linked with 16A78	
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Numbers:	(14-1382)
Decision Date:	May 29, 2015
Rehearing Denied:	August 11, 2015

Questions Presented

DATE	PROCEEDINGS AND ORDERS
Nov 04 2015	Petition for a writ of certiorari filed. (Response due December 7, 2015)
Dec 03 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner.
Dec 07 2015	Brief amici curiae of Association of Christian Schools International, and Lutheran Church - Missouri Synod filed.
Dec 07 2015	Brief amicus curiae of The American Center for Law & Justice filed.
Dec 07 2015	Brief amici curiae of Nevada, et al. filed.
Dec 07 2015	Brief of respondent Sara Parker Pauley, Director, Missouri Department of Natural Resources in opposition filed.
Dec 07 2015	Brief amicus curiae of Ethics & Religious Liberty Commission filed.
Dec 07 2015	Brief amicus curiae of Foundation for Moral Law filed. (Distributed)
Dec 18 2015	Reply of petitioner Trinity Lutheran Church of Columbia, Inc. filed.
Dec 22 2015	DISTRIBUTED for Conference of January 8, 2016.
Jan 11 2016	DISTRIBUTED for Conference of January 15, 2016.
Jan 15 2016	Petition GRANTED.
Feb 09 2016	The time to file the joint appendix and petitioner's brief on the merits is extended to and including April 14, 2016.
Feb 09 2016	The time to file respondent's brief on the merits is extended to and including June 28, 2016.
Mar 17 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Apr 14 2016	Joint appendix filed. (Statement of costs filed.)
Apr 14 2016	Brief of petitioner Trinity Lutheran Church of Columbia, Inc. filed.
Apr 18 2016	Brief amicus curiae of World Vision, Inc. filed.
Apr 19 2016	Brief amicus curiae of The American Center for Law & Justice filed.
Apr 20 2016	Brief amicus curiae of The Union of Orthodox Jewish Congregations of America filed.
Apr 20 2016	Brief amicus curiae of Justice and Freedom Fund filed.

Apr 21 2016	Brief amicus curiae of American Jewish Committee in support of neither party filed.
Apr 21 2016	Brief amicus curiae of The Becket Fund for Religious Liberty filed.
Apr 21 2016	Brief amicus curiae of Ethics & Religious Liberty Commission filed.
Apr 21 2016	Brief amici curiae of Association of Christian Schools International, and Lutheran Church - Missouri Synod filed.
Apr 21 2016	Brief amicus curiae of The Bronx Household of Faith filed.
Apr 21 2016	Brief amicus curiae of Institutional Religious Freedom Alliance filed.
Apr 21 2016	Brief amicus curiae of American Association of Christian Schools filed.
Apr 21 2016	Brief amici curiae of Members of Congress filed.
Apr 21 2016	Brief amici curiae of Council for Christian Colleges and Universities, et al. filed.
Apr 21 2016	Brief amicus curiae of Institute for Justice filed.
Apr 21 2016	Brief amici curiae of Douglas County School District, et al. filed.
Apr 21 2016	Brief amicus curiae of National Association of Evangelicals filed.
Apr 21 2016	Brief amicus curiae of Pacific Legal Foundation filed.
Apr 21 2016	Brief amici curiae of Nevada, et al. filed.
Apr 21 2016	Brief amicus curiae of The General Council of the Assemblies of God filed.
Apr 21 2016	Brief amicus curiae of Belmont Abbey College filed.
Apr 21 2016	Brief amici curiae of Law and Religion Practitioners filed.
Apr 21 2016	Brief amicus curiae of The Cato Institute filed.
Apr 21 2016	Brief amici curiae of Christian Legal Society, et al. filed.
Apr 21 2016	Brief amicus curiae of Colorado filed.
Apr 21 2016	Brief amici curiae of United States Conference of Catholic Bishops, et al. filed.
Apr 21 2016	Brief amici curiae of Liberty Counsel, et al. filed.
Apr 21 2016	Brief amicus curiae of WallBuilders, Inc. filed.
Jun 28 2016	Brief of respondent Sara Parker Pauley, Director, Missouri Department of Natural Resources filed.
Jul 05 2016	Brief amici curiae of American Civil Liberties Union, et al. filed.
Jul 05 2016	Brief amici curiae of Religious and Civil Rights Organizations filed.
Jul 05 2016	Brief amici curiae of Legal and Religious Historians filed.
Jul 05 2016	Brief amici curiae of Baptist Joint Committee for Religious Liberty and General Synod of The United Church of Christ filed.
Jul 05 2016	Brief amicus curiae of Lambda Legal Defense and Education Fund, Inc. filed.
Jul 05 2016	Brief amicus curiae of The National Education Association filed.
Jul 22 2016	Application (16A78) to extend the time to file a reply brief from July 28, 2016 to August 12, 2016, submitted to Justice Alito.
Jul 25 2016	Application (16A78) granted by Justice Alito extending the time to file until August 12, 2016.
Aug 12 2016	Reply of petitioner Trinity Lutheran Church of Columbia, Inc. filed.
Feb 17 2017	SET FOR ARGUMENT ON Wednesday, April 19, 2017.
Feb 24 2017	Record requested from the U.S.C.A. 8th Circuit.
Mar 02 2017	Record received from the U.S.C.A. 8th Circuit (1 box).
Mar 02 2017	CIRCULATED.
Apr 14 2017	Request from the Clerk that the parties submit their views on whether this case is affected by the press release relating to access to Missouri grant programs issued by Governor Greitens on April 13, 2017. The parties' views should be in the form of a letter delivered to the Court and served upon counsel by noon on Tuesday, April 18, 2017.
Apr 18 2017	Letter of petitioner pursuant to April 14, 2017 request of Clerk filed. (Distributed)

Apr 18 2017	Letter of respondent pursuant to April 14, 2017 request of Clerk filed. (Distributed)
Apr 19 2017	Argued. For petitioner: David A. Cortman, Lawrenceville, Ga. For respondent: James R. Layton, Jefferson City, Mo.
Jun 26 2017	Judgment REVERSED and case REMANDED. Roberts, C. J., delivered the opinion of the Court, except as to footnote 3. Kennedy, Alito, and Kagan, JJ., joined that opinion in full, and Thomas and Gorsuch, JJ., joined except as to footnote 3. Thomas, J., filed an opinion concurring in part, in which Gorsuch, J., joined. Gorsuch, J., filed an opinion concurring in part, in which Thomas, J., joined. Breyer, J., filed an opinion concurring in the judgment. Sotomayor, J., filed a dissenting opinion, in which Ginsburg, J., joined.
Jul 28 2017	JUDGMENT ISSUED.
Aug 07 2017	Record from the U.S.C.A. for the Eight Circuit has been returned.

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RECORD AND BRIEFS

Supreme Court, U.S.

NOV 4 - 2015

OFFICE OF THE CLERK

15-577

NO. _____

In the

Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Trinity Lutheran Church applied for Missouri's Scrap Tire Grant Program so that it could provide a safer playground for children who attend its daycare and for neighborhood children who use the playground after hours—a purely secular matter. But the state denied Trinity's application solely because it is a church. The Eighth Circuit affirmed that denial by equating a grant to resurface Trinity's playground using scrap tire material with funding the devotional training of clergy. The Eighth Circuit's decision was not faithful to this Court's ruling in *Locke v. Davey*, 540 U.S. 712 (2004), and deepened an existing circuit conflict. Three lower courts—two courts of appeals and one state supreme court—interpret *Locke* as justifying the exclusion of religion from a neutral aid program where no valid Establishment Clause concern exists. In contrast, two courts of appeals remain faithful to *Locke* and the unique historical concerns on which it relied.

The question presented is:

Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.

PARTIES TO THE PROCEEDING

Petitioner is Trinity Lutheran Church, Inc.

Respondent is Sara Parker Pauley, in her official capacity as Director of the Missouri Department of Natural Resources.

CORPORATE DISCLOSURE STATEMENT

Petitioner Trinity Lutheran Church is a non-profit corporation, exempt from taxation under 26 U.S.C. § 501(c)(3). It does not have parent companies and is not publicly held.

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INTRODUCTION

Trinity Lutheran Church applied for a state grant to fund the installation of safe rubber playground surfaces that would protect daycare and neighborhood children who use its playground. The Scrap Tire Grant Program is otherwise neutrally available to a variety of nonprofits and the state rated Trinity's grant application highly. But Trinity's attempt to participate in the program was abruptly halted when the state denied its application solely because Trinity is a church. The state based this exclusion from the program on Article I, § 7, of the Missouri Constitution, which states that "no money shall be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."

The Eighth Circuit panel majority, below, held that this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), provides the state with unfettered discretion to exclude churches from generally available public benefits. And it affirmed the dismissal of Trinity's complaint despite the nascent posture of the case, holding that it failed to state a claim upon which relief could be granted. But the panel majority's decision was not uncontested. Judge Gruender dissented and the Eighth Circuit denied rehearing en banc by a 5-5 vote, with Judges Colloton, Gruender, Riley, Shepherd, and Smith voting in favor of granting Trinity's petition for en banc review.

No public benefit could be further removed from the state's antiestablishment concerns than a grant

for safe rubber playground surfaces that serve no religious function or purpose. This Court should grant review to establish that, whatever *Locke's* scope, its holding does not apply to the wholly secular benefit of providing safe play areas for kids.

DECISIONS BELOW

The Eighth Circuit's decision affirming the judgment for Respondent is reported at 788 F.3d 779 and reprinted at Petition for Writ of Certiorari Appendix ("App.") 1a. The Eighth Circuit's order denying rehearing en banc is unreported but reprinted in App. 32a.

The District Court's opinion granting Respondent's motion to dismiss is reported at 976 F. Supp. 2d 1137 and reprinted at App. 34a. The District Court's opinion denying Petitioner's motion for reconsideration and for leave to file an amended complaint is unreported but reprinted in App. 76a.

STATEMENT OF JURISDICTION

The Eighth Circuit issued an opinion on May 29, 2015, and, by an equally divided court, denied rehearing en banc on August 11, 2015. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The text of the First Amendment to the United States Constitution is set forth in App. 85a.

The text of Article I, § 7, of the Missouri Constitution is set forth in App. 85a.

Missouri Statute §260.273, the statutory authorization for the Scrap Tire Grant Program under review, is set forth in App. 86a.

Title 10 §80-9.030 of the Missouri Code of State Regulations, the administrative regulation establishing the Scrap Tire Grant Program, is set forth in App. 89a.

STATEMENT OF THE CASE

The State of Missouri instituted a program of awarding grants to nonprofit organizations to purchase playground surfacing materials made from recycled tires. The program both benefits the environment by reducing the abundance of scrap tires and makes playgrounds safer for children.

Petitioner is a church that operates a daycare with a playground used by students and the surrounding community. The church applied for a grant to replace its rock surface with a safer rubber surface. Despite meeting all neutral criteria, the state denied the Church's application solely based on Article I, § 7, of the Missouri Constitution which prohibits government aid to churches. The Church brought suit alleging this denial violated the Free Exercise Clause and the Equal Protection Clause.

The Eighth Circuit panel majority affirmed the district court's order dismissing the Church's lawsuit over a dissent by Judge Gruender. The panel

majority, in conflict with other circuits and this Court's decision in *Locke*, held that excluding churches from an otherwise neutral and secular aid program did not violate the Free Exercise Clause or the Equal Protection Clause.

But this Court's decision in *Locke* ruled on a situation involving the historical establishment concern of funding the devotional training of clergy. *Locke* did not permit the categorical exclusion of religious groups from generally available secular benefits, like the safer playground surfaces at issue here. This Court's decisions in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), apply when states categorically exclude churches from neutral benefits, requiring such laws to overcome the rigors of strict scrutiny.

Yet the Court below read *Locke* as essentially abrogating this rule and allowing states to single out churches for exclusion from programs generally benefitting the public. As Justice Scalia noted in dissent, *Locke's* "holding is limited to training the clergy, but its logic is readily extendible, and there are plenty of directions to go." *Locke*, 540 U.S. at 734 (Scalia, J., dissenting). Legal scholars, such as Professor Douglas Laycock, expressed similar concerns that *Locke* could be applied beyond its holding. *See* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 161-62 (2003) (noting that *Locke*, "[a]s written, ... applies only to funding the training of clergy, but it may well be extended to

all funding decisions, including discriminatory refusals to fund secular services").

Lower courts have done just that, ignoring the *Locke* opinion's context and using its holding to justify the exclusion of religious groups from secular, neutral aid programs where there is no valid antiestablishment concern. *But see* Steven K. Green, Locke v. Davey *and the Limits to Neutrality Theory*, 77 TEMP. L. REV. 913, 929 (2004) (recognizing that "while a prohibition against funding clergy activities is historically supportable, such justifications would not support a broader distinction against ... the funding of religiously based social service agencies where the funds do not support inherently religious activities").

That application of *Locke* resulted in denying a safe rubber surface to a playground here. This Court should grant the Petition to clarify the proper application of the Free Exercise and Equal Protection Clauses to cases where a state withholds a generally available secular benefit based solely on religion where there is no historical establishment concern consistent with *Locke* and this Court's longstanding precedent.

A. Factual Background

Trinity Lutheran Church operates a pre-school education and daycare center named The Learning Center. App. 99a. The Learning Center formerly operated as a separate entity but merged into the Church in 1985 and now operates as a Church ministry. App. 99a.

Like many other preschool educational facilities, The Learning Center provides a playground for the children who attend, App. 102a, and children from the surrounding community use it as well, App. 133a. The playground surface of pea gravel and grass does not adequately protect the children who play there. App. 132a. The hard, jagged edges of the pea gravel shift away from the play equipment thereby posing a safety risk to children. App. 132a.

In 2012, the Church learned about the State of Missouri Scrap Tire Program, which provides grants for certain nonprofit organizations to purchase rubber pour-in-place playground surfaces made from recycled tires. App. 102a. The state funds the program through a fee imposed on the sale of new tires, *see* Mo. Stat. 260.273(6)(2), and the state uses the program to reduce the amount of used tires in landfills and illegal dump sites. App. 86a-88a. The Missouri Department of Natural Resources ("DNR") administers the Scrap Tire Program. App. 89a.

The Church submitted an application for a scrap tire grant to resurface its playground, which described the safety hazards it experienced:

> The pea gravel surface continually migrates away from critical play areas, especially under the swing sets and slide units and climbing units. [The Learning Center] has placed rubber mats in critical areas but the pea gravel continually erodes from under the mats and creates a trip hazard. The pea gravel is unforgiving if/when a child falls

and thereby poses a basic safety hazard.

App. 132a.

The Church also noted that the pour-in-place rubber playground surface was ADA-compliant and would ease and increase access to the playground. *Id.* The Church also highlighted the fact that increasing the safety of the playground with rubber surface material would benefit not only the students of The Learning Center, but also children from the community who use the playground after hours. *Id.*

The DNR ranks each application for the Scrap Tire Program because it only awards a certain number of grants per year. App. 103a. The DNR received forty-four applications the year that Trinity applied. App. 154a. The DNR ranked the Church's application fifth out of the forty-four applications. App. *Id.* The DNR awarded fourteen grants that year but denied Trinity a scrap tire grant solely because it is a church. *Id.*

The DNR notified the Church by letter, which explained:

> [A]fter further review of applicable constitutional limitations, the department is unable to provide this financial assistance directly to the church as contemplated by the grant application. Please note that Article I, Section 7 of the Missouri Constitution specifically provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any

church, sect, or denomination of religion...."

App. 152a-153a.

B. Procedural Background

Trinity filed a complaint in the U.S. District Court for the Western District of Missouri on January 25, 2013, alleging that the DNR's policy of denying scrap tire grants to churches violated the Free Exercise, Equal Protection, Free Speech, and Establishment Clauses of the First and Fourteenth Amendments to the United States Constitution, as well as the Missouri Constitution, Article I, § 7. Trinity's complaint was an as-applied challenge, focusing on the DNR's policy and its application to Trinity. Trinity did not bring a facial challenge to the Missouri Constitution, Article I, § 7.

The district court dismissed Trinity's complaint in its entirety. App. 34a. It rejected Trinity's free exercise claim, reasoning that the Scrap Tire Program involved a direct payment of funds to a sectarian institution that raised "antiestablishment concerns that are at least as comparable to those relied on by the Court in *Locke*." [1] App. 54a. The

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[1] Because the complaint was dismissed in its entirety, Trinity filed a motion for reconsideration and for leave to file an amended complaint. It sought to add new allegations relating to newly discovered evidence consisting of a list of past grant recipients that included churches. The District Court denied the Motion. App. 76a. Whatever the DNR's policy was in the past, the current DNR policy Trinity challenged here excludes all churches from participation in the Scrap Tire Program. *See* App. 152a-153a.

district court also cited *Locke* for the proposition that Trinity's failure "to allege a violation of the Free Exercise Clause" mean that its "Equal Protection claim must also be dismissed." App. 69a.

Trinity appealed to the Eighth Circuit which issued a divided panel opinion affirming the district court's dismissal of Trinity's Complaint. App. 1a. The panel opinion incorrectly characterized Trinity's Complaint as a facial attack on Article I, § 7, of the Missouri Constitution. App. 6a. This was despite the fact that the Complaint brought an as-applied challenge and explicitly stated so several times. *See, e.g.* App. 106a, 111a, 112a (alleging "Defendant['s] ... unconstitutional application of" Article I, § 7); App. 109a, 110a (challenging "Defendant's actions in unconstitutionally enforcing the [Article I, § 7] by denying Plaintiff's grant application").

The Complaint further requested limited relief that applied only to Trinity Lutheran. *See* App. 116a (requesting declaration that the DNR's denial of its grant application was unconstitutional); *Id.* (requesting injunctive relief only to prohibit the DNR from denying Trinity Lutheran's participation in the grant program); *Id.* (requesting the court "[d]eclare that [Article I, § 7] was unconstitutional as applied to deny Plaintiff's 2012 grant application").

Judge Gruender, in dissent, noted the panel majority's error:

> But Trinity Lutheran does not mount the expansive facial challenge that the court attributes to it. Trinity Lutheran tries to

> bring an as-applied challenge; the complaint says so numerous times.... This claim and relief only implicate Trinity Lutheran. Consequently, Trinity Lutheran does not contend that Article I, § 7 of the Missouri Constitution is unconstitutional in all of its applications."

App. 24a.[2]

Based on *Locke*, the Eighth Circuit panel majority held that the exclusion of churches from the Scrap Tire Grant Program was justified because there was no "break in the link" between state funds and religion. App. 10a. The Eighth Circuit was concerned about "the direct grant of public funds to churches, another of the 'hallmarks of an 'established' religion,'" regardless of the secular use to which those funds are put. *Id.* Like the district court, the Eighth Circuit panel majority cited *Locke* for the proposition that "the absence of a valid [f]ree [e]xercise claim" required the dismissal of Trinity's equal protection claim as well. App. 12a.

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[2] The panel majority's mischaracterization of Trinity's Complaint as a facial attack on Article I, § 7, of the Missouri Constitution led it to point to the three-judge district court opinion in *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974) (without opinion), as controlling adverse precedent. App. 7a. Because Trinity never argued that Article I, § 7, was facially invalid, the panel majority's discussion of *Luetkemeyer* is irrelevant. Moreover, *Luetkemeyer* addressed a difference in treatment of public and private schools, not discrimination between private secular and private religious schools, which is an entirely different issue.

Judge Gruender dissented because this Court's reasoning in *Locke* means that "Trinity Lutheran has sufficiently pled a violation of the Free Exercise Clause as well as a derivative claim under the Equal Protection Clause." App. 23a. Judge Gruender also correctly noted: "*Locke* did not leave states with unfettered discretion to exclude the religious from generally available public benefits." App. 26a. He explained that: "[i]f giving the Learning Center a playground-surfacing grant raises a *substantial* antiestablishment concern, the same can be said for virtually all government aid to the Learning Center, no matter how far removed from religion that aid may be." App. 29a.

Trinity filed a motion for rehearing en banc that was denied by an equally divided court. App. 32a-33a. Judges Colloton, Gruender, Riley, Shepherd, and Smith voted to grant rehearing en banc. *Id.*

REASONS FOR GRANTING THE WRIT

I. This Case Presents the Important Question of Whether *Locke* Justifies State Exclusions of Churches From Neutral Programs Raising No Establishment Clause Concerns.

The Eighth Circuit's decision here undermines protections for churches and other religious groups this Court has recognized under the Free Exercise Clause and the Equal Protection Clause. Generally, states may not specifically exclude religious groups from neutral programs absent a compelling state interest implemented by the least restrictive means. *See Church of the Lukumi,* 508 U.S. at 532-33; *see*

Emp't Div., 494 U.S. at 877.

The Eighth Circuit deviated from that general rule by elevating *Locke*'s ruling from its unique setting to swallow the protections for religious groups under the Free Exercise and Equal Protection Clauses. States can now justify disparate treatment and the exclusion of religious groups from generally available government programs simply by invoking the state establishment clause.

This Court should grant review to resolve an important issue of federal law among which there is a 3-2 conflict among the lower courts: whether states have unfettered discretion to withhold generally available benefits solely on the basis of religion where there is no Establishment Clause violation or historical concern.

The panel majority's decision in this case sides with the First Circuit and the Colorado Supreme Court and deepens a circuit conflict with the Seventh and Tenth Circuits. Its holding deviates from *Locke* and that decision's historical concern related to state aid for the devotional training of clergy. In the First and Eighth Circuits—and the state of Colorado—any wholly secular benefit is now an opportunity for states to single out churches, and potentially all religious groups for exclusion. And while this case involves scrap tire grants, nothing prohibits the state from applying its constitution to deny routine benefits—such as sewer and water service, and police and fire protection—to religious groups. This Court should grant review to clarify that the unique historical concerns underlying *Locke* do not insulate

all state religious exclusions from free exercise and equal protection challenges, and to restore the proper balance between the Religion Clauses.

II. The First and Eighth Circuits, as well as the Colorado Supreme Court are in Conflict with the Seventh and Tenth Circuits Regarding Whether *Locke v. Davey* Allows for the Exclusion of Religion from Otherwise Neutral Aid Programs.

The lower courts are in conflict regarding the proper interpretation and application of *Locke* to secular and otherwise neutral programs that exclude religion. As explained more fully below, this Court held in *Locke* that the State of Washington could deny scholarships to students who were pursuing a devotional theology degree. *See* 540 U.S. at 715. Critical to this Court's holding was the fact that the scholarship would go to fund the devotional training of clergy, an area where the state's antiestablishment concerns were historically high. *Id.* at 721-22. This Court noted that there was no animus toward religion in the history, text, or operation of the scholarship program, *id.* at 725, and that the scholarship program went a long way toward including religion in its benefits, *id.* at 724.

This Court upheld the State of Washington's religious exclusion because it fell within the "play in the joints" between what the Establishment Clause allowed and what the Free Exercise Clause required. *Id.* at 718-19, 725. But this Court was careful to note that the only interest at stake was the state's interest in not funding the devotional training of

clergy and that its opinion was not to be construed to justify exclusions based on any interest a state's "philosophical preference" might command. *Id.* at 722 n.5.

The lower courts have now had over ten years to apply *Locke*. They have done so inconsistently and, as in this case, in ways that are not faithful to the particular historical concern at issue in *Locke*—the religious training of ministers.

A. The First and Eighth Circuits, and the Colorado Supreme Court, Hold that *Locke* Allows for the Exclusion of Religion from Otherwise Neutral Aid Programs.

As the Tenth Circuit noted in *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1254 (10th Cir. 2008): "The precise bounds of the *Locke* holding ... are far from clear." This lack of clarity has led to substantial confusion in lower courts.

Three lower court decisions show this lack of clarity. In addition to the *Trinity Lutheran* decision by the Eighth Circuit, the subject of this petition, the First Circuit and the Colorado Supreme Court have misapplied *Locke* and converted it into a rule generally justifying state exclusions of churches and other religious groups from neutral state programs.

First Circuit

In *Eulitt ex rel. Eulitt v. Maine Department of Education*, 386 F.3d 344, 355 (1st Cir. 2004), the

First Circuit read *Locke* "broadly" to uphold a state's decision to categorically exclude the funding of sectarian schools from an otherwise neutral aid program. As the Tenth Circuit noted, the First Circuit "went well beyond the holding in *Locke*. Rather than declining to fund 'particular categories of instruction,' the state in *Eulitt* declined funding the entire program of education at the disfavored schools, based on their religious affiliation." *Colorado Christian*, 534 F.3d at 1256 n.4.

The First Circuit upheld the exclusion of sectarian schools from the funding program by looking solely at whether the program was motivated by religious animus. *Id.* at 355-56. In the First Circuit's view, the following factors taken from *Locke* "articulate a test for smoking out an anti-religious animus:"

> [A]n inquiring court must examine whether the state action in question imposes any civil or criminal sanction on religious practice, denies participation in the political affairs of the community, or requires individuals to choose between religious beliefs and government benefits.

Id. at 355. As long as no animus is present, the First Circuit conducts no further evaluation. *Id.*

Although animus is certainly sufficient to show a Free Exercise violation, it is not required. The Free Exercise Clause's protection extends "beyond those rare occasions on which the government explicitly targets religion ... for disfavored treatment."

Lukumi, 508 U.S. 577-78 (Blackmun, J., and O'Connor, J., concurring).[3] But the First Circuit ignored the unique historical concerns this Court relied upon in *Locke*, such as whether state aid was going for an essentially religious endeavor or whether the aid program included religion in its benefits to some degree, and permitted categorically excluding religion altogether.[4]

Colorado Supreme Court

In a recent opinion, the Colorado Supreme Court struck down, under the state constitution, a program that provided scholarships for students to attend private schools, including religious schools.[5] *See Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 351 P.3d 461, 475 (Colo. 2015). The plurality opinion in *Taxpayers for Public Education* held that the scholarship program violated Article IX, § 7, of the Colorado Constitution. A plurality of the court ruled that the state constitution required exclusion of religious schools from the aid program, and then

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[3] *See also Shrum v. City of Coweta*, 449 F.3d 1132, 1144-45 (10th Cir. 2006) (listing cases in which this Court and others foreclosed the application of laws enacted "not out of hostility or prejudice, but for secular reasons" on free exercise grounds).

[4] The First Circuit characterized the *Locke* opinion as confirming the "legitimacy of extra-constitutional Establishment Clause concerns." *Id.* at 355. Yet this Court never relied upon "extra-constitutional" concerns. The *Locke* Court characterized its decision as falling in the "play in the joints" between the Religion Clauses based on the unique historical concerns regarding the devotional training of clergy.

[5] Respondents in *Taxpayers for Public Education* have filed petitions for writs of certiorari seeking review by this Court.

justified this exclusion under *Locke*:

> By its terms, section 7 is far more restrictive than the Establishment Clause regarding governmental aid to religion, and the Supreme Court has recognized that state constitutions may draw a tighter net around the conferral of such aid. *See Locke v. Davey*, 540 U.S. 712, 721, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004) .

Taxpayers, 351 P.3d at 473-74. This is not "play in the joints" for state lawmakers, but the rejection of basic free exercise and equal protection principles in a case that involved no unique historically-based establishment concerns.

B. The Seventh and Tenth Circuits Hold that Locke Does Not Allow for the Exclusion of Religion from an Otherwise Neutral Aid Program.

In contrast to the First and Eighth Circuits, and the Colorado Supreme Court, the Tenth and Seventh Circuits hold that *Locke* did not leave states with unfettered discretion to exclude the religious from generally available secular benefits.

Tenth Circuit

The Tenth Circuit, in an opinion authored by Judge McConnell, held that *Locke* does not allow for the exclusion of students who attend "pervasively sectarian" colleges from a neutral scholarship program. *See Colo. Christian*, 534 F.3d at 1255. As

the Tenth Circuit explained:

> The opinion [in *Locke*] suggests, even if it does not hold, that the State's latitude to discriminate against religion is confined to certain "historic and substantial state interest[s]," and does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support.

Id. (quoting *Locke*, 534 F.3d at 725).

Unlike the Eighth and First Circuits, and the Colorado Supreme Court, that applied *Locke* out of context, Judge McConnell's opinion in *Colorado Christian* is faithful to the unique historical concerns that underlay this Court's decision. The Tenth Circuit thus continues to faithfully apply the Free Exercise Clause to protect individuals and groups from the denial of entirely secular benefits based solely on their religious practice and beliefs.

Seventh Circuit

The Seventh Circuit agrees with the Tenth Circuit that *Locke* does not justify categorically excluding religious groups from generally available government aid programs. In *Badger Catholic, Inc. v. Washington*, 620 F.3d 775 (7th Cir. 2010), the Seventh Circuit, in an opinion by Chief Judge Easterbrook, struck down the University of Wisconsin's ban on student-led groups using student activity fee funds for religious activities. 620 F.3d at 777. The Seventh Circuit noted that the University,

in contrast to the state in *Locke*, did not do anything to include religion in the aid program and instead categorically excluded it. 620 F.3d at 780. Thus, the *Badger Catholic* Court adhered to this Court's admonition that *Locke* does not justify widespread exclusions of religious groups from government aid programs in which government grants are neutrally available to all.

In either the Seventh or Tenth Circuits, federal courts would hold that the DNR's exclusion of churches from the scrap tire program violates the Free Exercise Clause. But in the Eighth and First Circuits, federal courts would conclude that such religious discrimination is allowed, even though it sends a much stronger message of disfavor than the "mild" message sent in *Locke*. That conflict requires resolution by this Court.

Certainly, as this Court has explained, if government may bar "the extension of general benefits to religious groups, 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981) (quoting *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 747 (1976)). But "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer*, 426 U.S. at 746; *see also Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 658, n.6 (1980) ("The Court never has held that religious activities must be discriminated against in this way."). This Court's review is warranted to resolve the conflict in the lower courts over the application of *Locke* to exclusions of religious groups from wholly secular

benefits like the rubber playground surface at issue in this case.

III. The Eighth Circuit's Ruling on Trinity's Claim under the Free Exercise Clause is Not Faithful to This Court's Decision in *Locke*.

The Eighth Circuit's opinion distorts *Locke* to justify the exclusion of religion from neutrally available public benefits even when there is no Establishment Clause violation or even a valid historical concern. None of the unique factors underlying this Court's decision in *Locke* are present here. Regardless, the Eighth Circuit rejected Trinity's free exercise claim. Its rationale allows the government to justify any exclusion of religious groups as "play in the joints" between the Religion Clauses. Such a gross deviation from free exercise precedent warrants this Court's review.

A. *Locke v. Davey*

In *Locke*, this Court held that the State of Washington did not violate the Free Exercise Clause when it denied scholarship funds solely to students pursuing a degree in devotional theology. 540 U.S. at 715. This Court held that the exclusion fell within the "play in the joints" between state actions "permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718-19. Several factors were key to the holding in *Locke*.

1. Funding for an essentially religious endeavor

First, this Court noted that Davey was seeking funding for an "essentially religious endeavor." *Id.* at 721. It could "think of few areas in which a state's antiestablishment interests come more into play." *Id.* at 722. This Court noted that "religious instruction is of a different ilk." *Id.* at 723. Importantly, the *Locke* Court cautioned that only the state's interest in not funding the devotional training of clergy was at issue and clarified that nothing in its opinion: "suggests that the [s]tate may justify any interest that its 'philosophical preference' commands." *Id.* at 722 n.5.

2. Fairly mild disfavor of religion

Second, this Court noted that the state's disfavor of religion in the scholarship program was fairly mild. *Id.* at 720-21. "It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit." *Id.* (internal marks and citations omitted).

3. Including religion in program

Third, this Court explained that the scholarship program at issue in *Locke* went "a long way toward including religion in its benefits." *Id.* at 724. Under the State of Washington's program, students could still attend pervasively religious schools and could

use their scholarship money to fund non-devotional theology classes. *Id.*

4. Lack of Blaine Amendment

The Court also noted that the Washington constitutional provision at issue was not a Blaine Amendment, nor had Davey "established a credible connection" to a state Blaine Amendment. *Id.* at 723. n.7. Accordingly, the Court did not consider the anti-Catholic bigotry that resulted in other states' constitutional provisions. *Id.*

Overall, given the relevant factors, this Court found no evidence of religious animus in the text, history, or operation of the scholarship program and thus, the program fell within the "play in the joints" between the Religion Clauses. *Id.* at 725.

B. The Eighth Circuit Did Not Faithfully Apply *Locke*.

None of the rationales underlying *Locke* apply to the Scrap Tire Program. Thus, the Eighth Circuit's decision to uphold the program against a free exercise challenge conflicts with this Court's controlling precedent, including *Widmar*, which rejected the State of Missouri's asserted interest "in achieving greater separation of church and [s]tate than is already ensured under the Establishment Clause of the Federal Constitution." 454 U.S. at 276. As the *Widmar* Court explained, that interest—the same concern the State of Missouri asserts here—"is limited by the Free Exercise Clause" and in this case by the Equal Protection Clause as well. *Id.*

1. *Funding for purely secular endeavor*

First, Trinity does not seek funding for an essentially religious endeavor where the state's antiestablishment concerns may be heightened. Trinity seeks a grant for a rubber pour-in-place playground surface where its children and those from the community play. Seeking to protect children from harm while they play tag and go down the slide is about as far from an "essentially religious endeavor" as one can get. As Judge Gruender explained in dissent:

> [S]choolchildren playing on a safer rubber surface made from environmentally-friendly recycled tires has nothing to do with religion. If giving the Learning Center a playground-surfacing grant raises a *substantial* antiestablishment concern, the same can be said for virtually all government aid to the Learning Center, no matter how far removed from religion that aid may be.

App. 29a.

The state cannot seriously argue that its desire to reduce the amount of used tires in landfills and illegal dump sites is an "essentially religious endeavor." Even the Eighth Circuit panel majority noted that "it now seems rather clear that Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire Grant Program without violating the Establishment Clause." App. 9a. That should be the end of the matter.

2. *Categorical disfavor of religion*

Second, Missouri's disfavor of religion is not the mild sort this Court approved in *Locke*. The Scrap Tire Program categorically excludes all church applicants. If an applicant is a church, it cannot receive a scrap tire grant even if it meets all other criteria, as was the case with Trinity Lutheran. *See* App. 154a (noting that Trinity's application ranked fifth out of forty-four and DNR awarded fourteen scrap tire grants in 2012).

The only way Trinity could receive a scrap tire grant would be for it hand over control of The Learning Center to a secular group or non-church nonprofit. Contrary to the Washington scholarship program in *Locke*, here the DNR requires applicants to "choose between their religious beliefs and receiving a government benefit." 540 U.S. at 720-21. Trinity is in the untenable position of either choosing to follow its religious beliefs and foregoing a government benefit, or of jettisoning its status as a church simply to participate in the Scrap Tire Grant Program. The DNR's religious exclusion sends a message that some children are less worthy of protection simply because they play on a playground owned by a church. This is not a mild disapproval of religion.

3. *Categorical exclusion of religion from a neutral benefits program*

Third, unlike in *Locke*, the Scrap Tire Grant Program does nothing to include churches. Instead,

it categorically excludes them from any and all benefits of the program. This sends a message of animus to the faithful that this Court found absent in *Locke*.

The Eighth Circuit panel majority was concerned that there was no "break in the link" between scrap tire funding and churches. *See* App. 10a. In *Locke*, the "break in the link" was the independent private choice of the scholarship recipients. *See Locke*, 540 U.S. at 719. But this Court's precedent is not so simplistic as to invalidate all aid to churches solely because they are religious and without regard to how the aid operates practically.

Programs, such as the one in this case, that evenhandedly allocate secular aid to a broad class of recipients without regard to religion, generally do not violate the Establishment Clause. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 809-14 (2000) (plurality opinion) (upholding program providing aid to parochial schools and stating that "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs"); *Agostini v. Felton*, 521 U.S. 203, 230-31, 234-35 (1997) (upholding program providing remedial instruction to disadvantaged children on a neutral basis even though program included government employees on the premises of sectarian schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) (upholding program that made funds generally available to any disabled child even though some children used the funds in a religious school).

Indeed, this Court has held that singling out religious entities for exclusion is unconstitutional. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (requiring school to allow religious groups access to school facilities on equal terms with other groups); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 840–43 (1995) (requiring equal access by religious group to student activity fee); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (requiring use of school facilities on neutral basis as to a religious group); *Widmar v. Vincent*, 454 U.S. 263, 273–75 (1981) (requiring religious group's equal access to open forum because it was generally available to all groups and any aid to religion was incidental).

This Court has never held that private choice in aid programs is the only way to "break the link" between government and religion. This Court has upheld neutral programs that benefit sectarian institutions where there is no private choice involved but where the aid had no religious content and furthering religious activities was either non-existent or *de minimis*. *See, e.g. Comm. for Pub. Educ. v. Regan*, 444 U.S. 646, 656–59 (1980) ("[T]here does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with state-furnished materials have no such effect."); *Roemer*, 426 U.S. at 736 (upholding direct grants to religious institutions

because of prohibition against using the grant for sectarian purposes); *Hunt v. McNair*, 413 U.S. 734, 736, 744-45 (1973) (upholding issuance of revenue bonds for benefit of religious college where there was a prohibition on use of funds for buildings or facilities used for religious purposes). That aid flows directly to a church or other sectarian institution is not alone determinative under this Court's precedent.

Under the Scrap Tire Grant Program, aid flows directly to the applicant, in this case a church, but it also flows to a variety of secular organizations. App. 102a. Importantly, the disbursement provided may *only* be used for materials and delivery costs and may not be used for any other purpose, such as site preparation or labor. App. 124a. There is therefore no possibility that state aid will be diverted to religious purposes.

Trinity cannot convert rubber protecting children from injury into the advancement of religious doctrines. All children playing on the playground are protected. And the aid is for recycled tires, which is a far cry from even the aid for instructional materials approved in *Mitchell*, or the provision of government-paid teachers to religious schools in *Agostini*. In short, there are simply no legitimate Establishment Clause concerns present that would justify reading *Locke* as authorizing the categorical disqualification of otherwise qualified churches from the receipt of a purely secular benefit.

4. Missouri Constitution Article I, § 7 is born of religious bigotry.

Article 1, § 7 of the Missouri Constitution, the provision the state relies upon here, was enacted in 1875—the same time as the federal Blaine Amendment was proposed and debated. *See* Mo. Const. Art 1, § 7, *available at* http://www.moga.mo.gov/MoStatutes/Consthtml/A010071.html (last visited Nov. 2, 2015). It thus shares the same grounding in "hostility to the Catholic Church and to Catholics in general" that this Court recognized in *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion).

In upholding the DNR's policy excluding Trinity Lutheran from the Scrap Tire Grant Program, the Eighth Circuit did not follow *Locke*. None of the factors this Court relied upon in *Locke* are present here. If allowed to stand, instead of preserving a "play in the joints," the Eighth Circuit's opinion will result in the Establishment Clause devouring the Free Exercise and Equal Protection Clauses. That is not what the *Locke* Court intended.

IV. The Eighth Circuit's Equal Protection Ruling Conflicts with this Court's Precedent.

The Equal Protection Clause requires that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). In this case, DNR is willing to award grants to secular daycares (and religious daycares not operated by churches) but denied

Trinity's application solely because it "is a 'church.'" App. 152a-153a. But "the Religion Clauses ... and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring).

Because the free exercise of religion is a fundamental right, the state's decision to make Trinity's religious status "relevant to [its] standing in the political community," *id.*, is subject to strict scrutiny under the Equal Protection Clause, *see Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457 (1988) (noting that "'strict judicial scrutiny'" applies when a law "interferes with a 'fundamental right'"). Indeed, under this Court's precedent, religious classifications are inherently "suspect" and must serve a compelling government interest and be narrowly tailored to that end. *See Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

Here, DNR denied "equal treatment" to Trinity solely because it is a church. *Kiryas Joel*, 512 U.S. at 715 (O'Connor, concurring). That arbitrary decision to deny Trinity a scrap tire grant because a church—rather than a secular (or other form of religious) nonprofit—holds title to the Learning Center serves no rational purpose, let alone a compelling one. Funding safe rubber playground surfaces for children poses no threat whatsoever to the state's antiestablishment goals. The state's extreme policy of "no churches allowed" is simply

unfounded here.

"Freedom of [religion], and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among [providing safe playground surfaces to daycares] on such a wholesale and categorical basis." *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 101 (1972). That is particularly true given that this Court generally treats religious classifications as "presumptively invidious." *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

The Eighth Circuit's decision upholding Trinity's exclusion from a wholly secular benefit enjoyed by all similarly situated daycares, based on the mistaken application of *Locke* and subsequent conclusion that Trinity did not present "a valid Free Exercise claim," warrants this Court's review. It not only contributes to an existing circuit conflict regarding equal protection analysis, but also misapplies *Locke* to a factually inapposite case.

Below, the Eighth Circuit panel majority compounded its error by rejecting Trinity Lutheran's equal protection claim based on its erroneous free exercise analysis. The Eighth Circuit cited *Locke* for the proposition that "in the absence of a valid Free Exercise claim, Trinity['s] Equal Protection Claim is governed by rational basis review" and held that "[t]he high wall of separation between church and state created by Article I, § 7" satisfies that standard. App. 12a; *see Locke*, 540 U.S. at 720 n.3 ("Because we hold ... that the program is not a violation of the Free Exercise Clause, however, we

apply rational-basis scrutiny to [Davey's] equal protection claims. For the reasons stated herein, the program passes such review.") (internal citations omitted).

The Eighth Circuit's decision adds to an existing circuit conflict between the First Circuit and the Tenth Circuit regarding equal protection analysis in cases that also involve free exercise claims.

First Circuit

In *Eulitt*, the First Circuit also cited *Locke* for the proposition that "if a challenged program comports with the Free Exercise Clause, that conclusion wraps up the religious discrimination analysis" and "rational basis scrutiny applies to any further equal protection inquiry." 386 F.3d at 354 (citing *Locke*, 540 U.S. at 720 n.3).

Tenth Circuit

But the Tenth Circuit in *Colorado Christian University* rejected this holding by explaining that "[v]iolations of the Equal Protection and Free Exercise Clauses are generally analyzed in terms of strict scrutiny" and concluding that "statutes involving discrimination on the basis of religion ... are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause." 534 F.3d at 1266 (citing *Locke*, 540 U.S. at 720 n.3, among other cases).

The Tenth Circuit's equal protection holding was grounded on its adherence to the plain language of

Locke and refusal to misread this Court's decision as subjecting "all 'state decisions about funding religious education to no more than rational basis review.'" *Id.* at 1254-55 (quoting Appellee's Br. 33).

In stark contrast, the Eighth and First Circuits applied *Locke* out of context to situations that bear no resemblance to "the clergy training involved in *Locke*" or that implicate any similar historical establishment concern. *Id.* at 1254; *see supra* Part III (outlining the unique historical bases for *Locke's* free exercise and equal protection holdings).

As a result, in the Tenth Circuit, federal courts would hold that the DNR's exclusion of churches from the scrap tire program triggers strict scrutiny and violates the Equal Protection Clause. But in the Eighth and First Circuits, federal courts would conclude that such religious discrimination is subject to rational basis review and that it readily hurdles that standard. This conflict regarding *Locke's* application to equal protection analysis in the free exercise realm can only be resolved by this Court.

V. This Case is a Clean Vehicle.

This case presents an ideal vehicle for resolving the question presented, an important and longstanding question of federal law. The facts are straightforward and are not open to dispute. And because this case was decided on a motion to dismiss, the facts alleged in the Complaint must be taken as true. Accordingly, the question presented can be decided as a matter of law.

Moreover, the grant program at issue makes this case a particularly clean vehicle. The Scrap Tire Program is completely secular and free of any nuances that could detract from deciding the issues presented in this appeal. Specifically, the state's program provides purely secular aid in the form of grants that can be used only for the purchase and delivery of scrap tire material and cannot be used for any other purpose. No aid provided through the program could arguably be labeled religious, thus allowing this Court to confront directly the issue of whether Trinity can be excluded from participating in a purely secular and neutral aid program solely because it is a church.

The parties are also particularly well suited for resolution of the question presented. Petitioner is a church that operates a daycare that was previously operated under the auspices of a separate nonprofit organization. Thus, the issue of participation by a church in a purely secular grant program is presented cleanly for resolution.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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November 4, 2015

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 14-1382

Trinity Lutheran Church of Columbia, Inc.

Plaintiff – Appellant

v.

Sara Parker Pauley, in her official capacity

Defendant - Appellee

The Becket Fund for Religious Liberty

Amicus on Behalf of Appellant(s)

American Civil Liberties Union Foundation, et al.

Amici on Behalf of Appellee(s)

Appeal from United States District Court
for the Western District of Missouri – Jefferson City

Submitted: January 15, 2015
Filed: May 29, 2015

Before LOKEN, MELLOY, and GRUENDER, Circuit Judges.

LOKEN, Circuit Judge.

Trinity Lutheran Church of Columbia, Inc. ("Trinity Church"), filed this action alleging that Sara Pauley, acting in her official capacity as Director of the Missouri Department of Natural Resources ("DNR"), violated Trinity Church's rights under the United States and Missouri Constitutions by denying its application for a grant of solid waste management funds to resurface a playground on church property. The district court[1] dismissed the Complaint for failure to state a claim and denied Trinity Church's post-dismissal motion for leave to file an amended complaint. Trinity Church appeals both rulings. We affirm.

I. Background

Trinity Church operates on its church premises a licensed preschool and daycare called the Learning Center. Initially established as a non-profit corporation, the Learning Center merged into Trinity Church in 1985. The Learning Center has an open admissions policy. It is a ministry of Trinity Church that teaches a Christian world view and incorporates daily religious instruction in its programs.

DNR offers Playground Scrap Tire Surface Material Grants, a solid waste Management program. The grants provide DRN funds to qualifying organizations for the purchase of recycled

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[1] The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri.

tires to resurface playgrounds, a beneficial reuse of this solid waste. See Mo. Rev. Stat. §§ 260.335.1, 260.273.6(2). In 2012, Trinity Church applied for a grant to replace the Learning Center's playground surface, disclosing that the Learning Center was part of Trinity Church. On May 21, 2012, the Solid Waste Management Program Director wrote the Learning Center's Director, advising:

> [A]fter further review of applicable constitutional limitations, the department is unable to provide this financial assistance directly to the church as contemplated by the grant application. Please note that Article I, Section 7 of the Missouri Constitution specifically provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, section or denomination of religion."

A Solid Waste Management Program planner subsequently advised the Solid Waste Management District Director that Trinity Church's application ranked fifth out of forty four applications in 2012, and that fourteen projects were funded.

Trinity Church commenced this action, asserting federal question jurisdiction over claims that the denial of its Scrap Tire application violated (i) the Equal Protection Clause of the Fourteenth Amendment, (ii) its First Amendment right to free exercise of religion, (iii) the First Amendment's Establishment Clause, and (iv) its First Amendment right of free speech. The Complaint invoked the district court's supplemental jurisdiction over a fifth

cause of action, alleging that DNR's denial violated Article I, Section 7, of the Missouri Constitution. Trinity Church sought injunctive and declaratory relief against DNR "policies and actions in denying grants to applicants who are churches or connected to churches."

The district court granted Director Pauley's motion to dismiss the complaint for failure to state a claim. Trinity timely moved for reconsideration and for leave to amend its complaint to add a factual allegation that the DNR had previously given grants under the Scrap Tire Program to at least fifteen other religious organizations, including churches. The district court denied the motion to reconsider. It also denied leave to amend because Trinity Church "fail[ed] to provide any explanation for not amending its Complaint prior to the dismissal of this action." The court further noted that the amendment was "futile" because, while Trinity Church argued the newly alleged fact "undermines Missouri's purported interest" in denying the application, Trinity Church "failed to identify any valid legal theory under which Missouri would need to show the existence of a compelling interest."

Trinity Church appeals every aspect of the district court's rulings, except the dismissal of its First Amendment free speech claim. We review the dismissal of a complaint for failure to state a claim *de novo*. Dunbar v. Wells Fargo Bank, N.A., 709 F.3d 1254, 1256 (8th Cir. 2013). We review the denial of leave to amend for abuse of discretion, but we review *de novo* legal conclusions underlying a determination

of futility. In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig., 623 F.3d 1200, 1208 (8th Cir. 2010).

II. The Federal Constitutional Claims

"Missouri has a long history of maintaining a very high wall between church and state." Luetkemeyer v. Kaufmann, 364 F. Supp. 376, 383-84 (W.D. Mo. 1973), aff'd, 419 U.S. 888 (1974). Two provisions in the Missouri Constitution "declaring that there shall be a separation of church and state are not only more explicit but more restrictive than the Establishment Clause of the United States Constitution." Paster v. Tussey, 512 S.W.2d 97, 101-02 (Mo. banc 1974), cert. denied, 419 U.S. 1111 (1975). Those provisions, one of which is at the core of this dispute, were initially adopted in 1870 and 1875. As re-adopted in the Missouri Constitution of 1945, they now provide:

> **Art. I, § 7.** That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect, or creed of religion, or any form of religious faith or worship.

> **Art. IX, § 8.** Neither the general assembly, nor any county, city, town [etc.] shall ever

> make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school ...or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation... ever be made by the state ... for any religious creed, church, or sectarian purpose whatever.[2]

Trinity Church's Complaint alleged that, by denying its grant application solely because it is a church, DNR (i) violated the Free Exercise clause because it "target[ed] religion for disparate treatment" without a compelling government interest; (ii) violated the Establishment Clause because the denial "was hostile to religion" and required DNR "to determine what is religious enough" to justify denial; and (iii) violated the Equal Protection Clause by discriminating against religious learning centers and day care organizations without a compelling government interest. Although Trinity Church couched these claims as an attack on DNR's "customs, policies and practices," all its claims are plainly facial attacks on Article I, § 7, of the Missouri Constitution, which provides that "no money shall ever be taken from the public treasury,

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[2] These two Sections are construed together to make up Missouri's Establishment Clause. See St. Louis Univ. v. Masonic Temple Ass'n of St. Louis, 220 S.W.3d 721, 725 (Mo. banc 2007).

directly or indirectly, in aid of any church," and which was cited by DNR as the sole basis for its denial.

Viewed in this light, it is apparent that Trinity Church seeks an unprecedented ruling -- that a state constitution violates the First Amendment and the Equal Protection Clause if it bars the grant of public funds to a church. To prevail, Trinity Church must clear a formidable if not insurmountable hurdle, what appears to be controlling adverse precedent. In Luetkemeyer, a three-judge district court was convened in the Western District of Missouri to consider a claim that the First Amendment and the Equal Protection clause required Missouri to provide the same public transportation benefits for the pupils of church-related schools as were being provided to transport children to public schools. 364 F. Supp. at 377. In denying plaintiffs injunctive and damage relief, the majority explained:

> We conclude without hesitation that the long established constitutional policy of the State of Missouri, which insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment, is indeed a 'compelling state interest in the regulation of a subject within the State's constitutional power' . . . That interest, in our judgment, satisfies any possible infringement of the Free Exercise clause of the First Amendment or of any other prohibition in the Constitution of the United States.

* * * * *

> The fact that Missouri has determined to enforce a more strict policy of church and state separation than that required by the First Amendment does not present any substantial federal constitutional question.

Id. at 386 (quotation and citations omitted). Plaintiffs appealed to the Supreme Court of the United States. The Court summarily affirmed. Two Justices dissented, arguing the Court should have noted probable jurisdiction and set the case for argument on two questions, whether the different treatment of public-school and parochial-school children violated equal protection principles, and whether the arbitrary denial of a general public service made the State an "adversary" of religion. 419 U.S. at 890 (White, J., dissenting).

When the Supreme Court summarily affirms a lower federal court, its decision "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided," but the Court has affirmed only the judgment, not necessarily the rationale of the lower court. Mandel v. Bradley, 432 U.S. 173, 176 (1977). Here, while the parameters of the Supreme Court's summary affirmance in Luetkemeyer may not be free from doubt, given the issues addressed in the dissent from summary affirmance, we conclude that the Court necessarily decided that Article I, § 7, of the Missouri Constitution is *not* facially invalid. That conclusion is supported by the Court's prior

summary affirmance in Brusca v. State of Mo. ex rel. State Bd. of Educ., 332 F. Supp. 275, 279-80 (E.D. Mo. 1971) (concluding that Article IX, § 8, and Missouri statutes denying public funds to sectarian schools for religious instruction do not violate the Free Exercise or the Equal Protection clauses), aff'd, 405 U.S. 1050 (1972); see also Wheeler v. Barrera, 417 U.S. 402, 412 n.9, 421- 22, 426 (1974).

Trinity Church requests injunctive relief compelling Missouri to provide grants directly to churches, funding that is prohibited by a provision of the Missouri Constitution that has been a bedrock principle of state law for nearly 150 years. Without question, a state constitutional provision is invalid if it conflicts with either religion clause of the First Amendment, or with the Fourteenth Amendment's Equal Protection Clause. We also recognize that the Supreme Court's Establishment Clause jurisprudence has evolved rather dramatically in the forty years since Luetkemeyer was decided. For example, it now seems rather clear that Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire grant program without violating the Establishment Clause. But the issue here is not what the State is constitutionally permitted to do, but whether the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause *compel* Missouri to provide public grant money directly to a church, contravening a long-standing state constitutional provision that is not unique to Missouri.

No Supreme Court case, before or after Luetkemeyer, has granted such relief. Indeed, in Locke v. Davey, 540 U.S. 712 (2004), the Court upheld State of Washington statutes and constitutional provisions that barred public scholarship aid to post-secondary students pursuing a degree in theology. The Court noted the "popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion." Id. at 722. In Locke, "the link between government funds and religious training [was] broken by the independent and private choice of [scholarship] recipients," id. at 719, prompting the Court to examine carefully the "relatively minor burden" the scholarship exclusion placed on students taking devotional theology courses, id. at 725. By contrast, in this case there is no break in the link. Trinity Church seeks to compel the direct grant of public funds to churches, another of the "hallmarks of an 'established' religion." Therefore, while there is active academic and judicial debate about the breadth of the decision, we conclude that Locke reinforces our decision that Luetkemeyer is controlling precedent foreclosing Trinity Church's facial attack on Article I, § 7, of the Missouri Constitution.

Justice Scalia, dissenting for himself and Justice Thomas in Locke, articulated a contrary view of the First Amendment's religion clauses:

> When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens

> on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.

Id. at 726-27. If the Court were to adopt this view, and if Justice Scalia's reference to withholding benefits to "individuals" were held to include direct public benefits to churches, then Article I, § 7, of the Missouri Constitution could not be validly applied to deny church participation in a host of publicly-funded programs. That may be a logical constitutional leap in the direction the Court recently seems to be going, but it is a leap of great magnitude from the Court's decisions in Luetkemeyer and in Locke. In our view, only the Supreme Court can make that leap. As the Court has often reminded us, a court of appeals "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Agostini v. Felton, 521 U.S. 203, 237 (1997) (an Establishment Clause decision). We therefore follow Luetkemeyer and the many Supreme Court of Missouri decisions concluding that Article I, § 7, of the Missouri Constitution does not conflict with the First Amendment or the Equal Protection Clause of the United States Constitution.

For these reasons, we conclude that the district court correctly dismissed Trinity Church's federal

constitutional claims for failure to state a claim upon which relief could be granted.[3]

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[3]Even if Luetkemeyer were not controlling, we see little merit to Trinity Church's constitutional arguments, based on existing precedent. The Supreme Court in Locke expressly recognized that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." 540 U.S. at 719. Until the Court rules otherwise, the direct expenditure of public funds to aid a church is a paradigm example of that type of state action. "There is *no* relevant precedent for using [the Establishment Clause's] negative prohibition as a basis for extending the right of a religiously affiliated group to secure state subsidies." Strout v. Albanese, 178 F.3d 57, 64 (1st Cir.), cert. denied, 528 U.S. 931 (1999); see Bronx Household of Faith v. Bd. of Educ. of City of N.Y., 750 F.3d 184, 198 (2d Cir. 2014), cert. denied, --- S. Ct. ---, 2015 WL 1400936 (2015); Eulitt ex rel. Eulitt v. Maine, Dept. of Educ., 386 F.3d 344, 355 (1st Cir. 2004). DNR's decision to deny the grant application because Trinity Church is a "church" within the meaning of Article I, § 7, of the Missouri Constitution hardly required an excessive entanglement with religion, unlike the state statute at issue in Colorado Christian Univ. v. Weaver, 534 F.3d 1245, 1250-51 (10th Cir. 2008) (requiring consideration of factors to determine whether a scholarship applicant was ineligible because the institution of higher education was "pervasively sectarian").

As the district court recognized, in the absence of a valid Free Exercise claim, Trinity Church's Equal Protection Claim is governed by rational basis review. Locke, 540 U.S. at 720 n.3. The high wall of separation between church and state created by Article I, § 7, is a historic and substantial State interest that DNR was obligated to obey in administering the Spare Tire grant program. This interest clearly satisfies rational basis review. See Luetkemeyer, 364 F. Supp. at 383-84 and cases cited.

III. The Missouri Constitutional Claim

Trinity Church's fifth cause of action alleged that the DNR's grant denial violated the second clause of Article I, § 7, which forbids "any discrimination made against any church," and that granting the application would not have violated the first clause because it would not have been "in aid any church." Though pleaded last, this was the only claim argued at length by Trinity Church at the hearing on defendant's motion to dismiss, and it was the lead argument in its brief on appeal (seemingly an implicit acknowledgment the federal constitutional claims are weak). This inversion of the theories pleaded distracted the district court from a very serious issue -- after dismissing the federal claims, should the court have declined to exercise its supplemental jurisdiction over a state law claim that is based on an important provision of the Missouri Constitution and turns on the proper interpretation of rather ambiguous Supreme Court of Missouri precedents? We think that question should have been answered affirmatively, but we will nonetheless review the district court's dismissal of this claim on the merits.

Under Missouri law, the district court had jurisdiction to decide the state law claim pleaded in the initial Complaint because whether Article I, § 7, permits DNR to deny Scrap Tire Program grants to all church applicants is an issue of law. See Premium Std. Farm, Inc. v. Lincoln Twp., 946 S.W.2d 234, 237-38 (Mo. banc 1997) (exhaustion of administrative remedies is a jurisdictional issue);

Motor Control Specialties, Inc. v. Petelik, 258 S.W.3d 482, 485-86 (Mo. App. 2008). Turning to the merits, we agree with the district court that the two clauses of Article I, § 7, must be interpreted in harmony. See Union Elec. Co. v. Dir. of Revenue, 425 S.W.3d 118, 122 (Mo. banc 2014); Wring v. City of Jefferson, 413 S.W.2d 292, 300 (Mo. Banc 1967). Therefore, if granting Trinity Church's application would have constituted "aid" to a church prohibited by the first clause of Article I, § 7, then denying the grant was not a discriminatory action prohibited by the second clause. So the district court properly focused on Trinity Church's contention that a Scrap Tire Program grant is not "aid" within the meaning of the first clause of Article I, § 7, because it involves a quid pro quo, with the applicant undertaking obligations under the Scrap Tire Program in exchange for the granted funds. On appeal, Trinity Church argues the court erred in rejecting this interpretation of state law.

Trinity Church bases its contention on the reasoning in two Supreme Court of Missouri decisions, Kintzele v. City of St. Louis, 347 S.W.2d 695 (Mo. banc 1961), which Trinity Church did not cite to the district court, and Americans United v. Rogers, 538 S.W.2d 711 (Mo. banc), cert. denied, 429 U.S. 1029 (1976), which the district court described as "grossly misrepresented" by Trinity Church. Concluding that the quid pro quo exception to Article I, § 7's, prohibition was not supported by any Missouri case, the court instead relied on the many Supreme Court of Missouri decisions that "strictly interpreted [Article I] Section 7 to prohibit public

funding of religious institutions" in order to maintain "the higher wall of separation between church and state present in the Missouri Constitution." See Paster, 512 S.W.2d at 104-105 (invalidating statute requiring public school boards to provide textbooks to private school students); Bereghorn v. Reorg. Sch. Dist. No. 8, 260 S.W.2d 573, 582-83 (Mo. 1953); McVey v. Hawkins, 258 S.W.2d 927, 933-34 (Mo. 1953) (enjoining use of public school buses to transport students to religious schools); Harfst v. Hoegen, 163 S.W.2d 609, 613-14 (Mo. 1941) (enjoining use of public school funds for the teaching of religion and faith at a parochial school that was taken into the public school system); accord Luetkemeyer, 364 F. Supp. at 383- 84 (upholding the State's refusal to provide transportation to church-sponsored schools); Brusca, 332 F. Supp. at 279-80 (the State may deny funds to sectarian schools for religious instruction).

Based on these decisions, the district court concluded that Trinity Church's state law claim under the Missouri Constitution must be dismissed because its "own pleadings demonstrate that funds from [DNR] in the form of the Scrap Tire Program would aid the Church and its Ministry Learning Center within the meaning of Missouri law." We agree with this assessment of how the Supreme Court of Missouri would decide this claim. In Kintzele, plaintiffs alleged that a subsidized sale of land by the State to St. Louis University constituted an unconstitutional use of public funds in aid of a private sectarian school. The Court declined to invalidate the sale, concluding that, because

Missouri law authorized "sale by negotiation at fair value," and the State tried competitive bidding and thereafter sold the land to SLU at nearly twice the highest bid, "plaintiffs' contention of illegal . . . subsidy from public funds cannot be sustained." 347 S.W.2d at 700-701. This decision in no way supports Trinity Church's claim that a Scrap Tire Program grant is not "aid."

In Americans United, the Supreme Court of Missouri upheld a statute providing tuition grants to students at approved public and private colleges. The statute was invalidated by the trial court, applying Article I, § 7, and Article IX, § 8. The State appealed. Noting that "[a]n act of the legislature is presumed to be valid and will not be declared unconstitutional unless it clearly and undoubtedly contravenes some constitutional provision," 538 S.W.2d at 716, the Court concluded it could not "with confidence declare that the statutory program" clearly contravened these constitutional provisions because "the parochial school cases with which the court has dealt in the past involved completely different types of educational entities than the colleges and universities herein involved." Id at 721-22. The defendants' quid pro quo argument was noted but not adopted. Id. at 721.

Americans United demonstrates that Article I, § 7, will be difficult to apply in some cases, particularly when an expenditure authorized by state statute is challenged as beyond the State's constitutional authority. But that decision does not support Trinity Church's claim to affirmative relief

in this case. In upholding the challenged program, the Court reaffirmed that the Missouri Constitution is "more restrictive than the First Amendment to the United States Constitution in prohibiting the expenditures of public funds in a manner tending to erode the absolute separation of church and state," and it noted that the program was "designed and implemented for the benefits of the students, not of the institutions, and that the awards are made to the students, not to the institutions. The legislative purpose in no wise includes supporting aiding or sustaining either public or private educational institutions." Id. at 720.

We affirm the district court's dismissal of the state law claim under the Missouri Constitution in Trinity Church's original Complaint.

IV. The Motion to Amend

Following the district court's dismissal order, Trinity Church filed a motion to reconsider that included a motion for leave to amend its Complaint. The proposed Amended Complaint added a fact paragraph alleging that the DNR had previously awarded Scrap Tire Program grants to at least fifteen other religious organizations. It also added a paragraph to the Equal Protection Clause cause of action alleging that DNR "has allowed other similarly-situated religious organizations to participate in the Scrap Tire Program." All other allegations in the ninety-seven-paragraph Complaint were unchanged. Trinity Church attached as an exhibit a document dated October 19, 2010, that

listed "Prior Recipients of Scrap Tire Surface Material Grants." The district court denied the motion because Trinity Church failed to provide any explanation for failing to amend prior to dismissal of its action.

"Post-dismissal motions to amend are disfavored." Medtronic, 623 F.3d at 1208. While a post-dismissal motion may be granted if timely requested, "interests of finality dictate that leave to amend should be less freely available after a final order has been entered." U.S. ex rel. Roop v. Hypoguard USA, Inc., 559 F.3d 818, 823 (8th Cir. 2009). Numerous cases have ruled that unexcused delay is sufficient to justify denial of post-dismissal leave to amend. United States v. Mask of Ka-Nefer-Nefer, 752 F.3d 737, 743-44 (8th Cir. 2014), and cases cited.

On appeal, Trinity Church for the most part ignores this well-established law, simply distinguishing the cases cited by the district court because Trinity Church was not "given any warning that it needed to amend its pleadings." The briefs on appeal assert that Trinity Church learned in discovery that other religious entities had received grants, but counsel admitted at oral argument that Trinity Church obtained the October 2010 listing attached to the proposed Amended Complaint from the DNR website, where it was doubtless available when Trinity Church filed its Complaint in January 2013. Thus, the district court did not abuse its discretion in concluding that Trinity Church failed to

provide a valid reason for its failure to amend prior to dismissal.

The district court's alternative futility ruling is more problematic and warrants *de novo* consideration. The proposed amended pleading did not alter the allegations in the First Amendment causes of action based on the Free Exercise Clause and the Establishment Clause; it only alleged a different type of discrimination violating the Equal Protection Clause, discrimination between "similarly situated religious organizations." Thus, when Trinity Church argued to the district court that its newly discovered evidence supported the claim that DNR's grant application denial "lacks a compelling interest," the district court was right to observe that this added nothing to the original claims because, in the absence of a valid Free Exercise or Establishment Clause claim, the Equal Protection Clause claim was subject to rational basis review and no compelling interest need be shown.

There is a problem lurking here, one that was camouflaged by Trinity Church's primary contention that Article I, § 7, violates the federal and state constitutions by mandating that churches be excluded from the Scrap Tire Program. The problem is that these constitutional claims take on an entirely new complexion if DNR is awarding Scrap Tire grants to some churches, but not to others. If intentional, that would be a clear violation of the First Amendment, and no doubt of the Missouri Constitution as well. See, e.g., Larson v. Valente, 456 U.S. 228, 246 (1982) ("No State can pass laws

which aid one religion or that prefer one religion over another"); Waites v. Waites, 567 S.W.2d 326, 333 (Mo. banc 1978) ("Any suggestion that a state judicial officer [was] favoring or tending to favor one religious persuasion over another . . . would be intolerable to our organic law"). If the proposed Amended Complaint plausibly pleaded this dramatically new theory, did the district court abuse its discretion in failing to grant leave to amend, even if Trinity Church failed to clearly articulate the theory? We conclude not, for two distinct but related reasons.

First, "a district court does not abuse its discretion in refusing to allow amendment of pleadings to change the theory of a case if the amendment is offered after summary judgment has been granted against the party, and no valid reason is shown for the failure to present the new theory at an earlier time." Littlefield v. City of Afton, 785 F.2d 596, 610 (8th Cir. 1986) (quotation omitted). In Littlefield, we affirmed the denial of leave to amend a dismissed § 1983 due process action to assert a new equal protection claim. Id. at 609. That is directly analogous to the situation here. The facts were at hand to assert this narrower theory in the initial Complaint, but Trinity Church chose not to do so. "The district court did not abuse its discretion in concluding [this] tactical choice did not demonstrate diligence or good cause." Morrison Ents., L.L.C. v. Dravo Corp., 638 F.3d 594, 611 (8th Cir.), cert. denied, 132 S. Ct. 244 (2011).

Second, the new theory we have identified would significantly alter the lawsuit's procedural landscape. Under the new theory, both the federal and state constitutional claims would turn on the fact bases for DNR's allegedly discriminatory treatment of similarly situated religious organizations, not on a Constitution-driven "policy" of not making any grants to churches. For the federal claims, this raises a serious question of what is called Pullman abstention[4] -- "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 236 (1984); see Beavers v. Ark. State Bd. of Dental Exam'rs, 151 F.3d 838, 840-41 (8th Cir. 1998). Here, a state court would be in the best position to decide the "difficult and unsettled" question of how Article I, § 7, and other provisions of the Missouri Constitution and statutes apply to DNR's fact-based decisions whether to award Scrap Tire Program grants to particular church-related applicants. And state court resolution of that question would likely moot or resolve, and most certainly would affect, a federal court's resolution of the substantial, largely overlapping First Amendment and Equal Protection Clause issues.

For the state law claim, the new theory appears to raise serious jurisdiction and venue issues under the Missouri Administrative Procedure Act, Mo. Rev.

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[4] Derived from Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

Stat. §§ 536.010 et seq. See Motor Control Specialties, 258 S.W.3d at 485-87. These issues would best be resolved by a state court, further supporting Pullman abstention. In these circumstances, even if the proposed Amended Complaint pleaded a new theory of relief that was not entirely futile, the district court did not abuse its discretion in denying an untimely request to fundamentally alter the litigation.

The judgment of the district court is affirmed.

GRUENDER, Circuit Judge, concurring in part and dissenting in part.

Trinity Lutheran Church ("Trinity Lutheran") applied for a grant through the Learning Center, a daycare and preschool that Trinity Lutheran runs. This grant would allow the Learning Center to make its playground safer by swapping the gravel that covers it for a rubber surface made from recycled tires. The Missouri Department of Natural Resources ("the Department"), which administers this grant program, accepted Trinity Lutheran's application and ranked it fifth out of the forty-four applications from that year. The Department approved fourteen grant applications, but Trinity Lutheran's was not among them. Relying solely on the Missouri Constitution's prohibition on using public funds to aid a church, Mo. Const. Art. I, § 7, the Department denied Trinity Lutheran's grant application. Thus, but for the fact that the Learning Center was run by a church, it would have received a playground-surfacing grant. Where, as here,

generally available funds are withheld solely on the basis of religion, the Supreme Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), governs claims brought under the Free Exercise Clause of the First Amendment. Applying the careful balance struck by *Locke*, I would conclude that Trinity Lutheran has sufficiently pled a violation of the Free Exercise Clause as well as a derivative claim under the Equal Protection Clause.

The court attempts to impose a barrier to full consideration of *Locke*. Trinity Lutheran, the court concludes, challenges the facial validity of Article I, § 7 of the Missouri Constitution by requesting a ruling that "a state constitution violates the First Amendment and the Equal Protection Clause if it bars the grant of public funds to a church." *Ante* at 5. By framing Trinity Lutheran's claim this broadly, the court avoids fully grappling with *Locke* by merely pointing to an instance in which this state constitutional provision has been upheld. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (requiring a plaintiff raising a facial attack to show "no set of circumstances" under which a provision would be valid). The court concludes that the Supreme Court's summary affirmance in *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974), a case that concerned the separate issue of busing, *id.* at 377, is one such application.[5]

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[5] The Department did not cite *Luetkemeyer* in its appeal brief. By the court's reasoning, the Department's failure to raise this argument (much less order it first in its brief) serves as "seemingly an implicit

But Trinity Lutheran does not mount the expansive facial challenge that the court attributes to it. Trinity Lutheran tries to bring an as-applied challenge; the complaint says so numerous times. However, determining whether a constitutional challenge is purely as-applied, purely facial, or somewhere in between turns on whether the plaintiff's "claim and the relief that would follow ... reach beyond the particular circumstances of the[ ] plaintiff[ ]." *Doe v. Reed*, 561 U.S. 186, 194 (2010). If they do, the claim is facial but only "to the extent of that reach." *Id.* When analyzing a claim and the relief that would follow, a court should "construe a plaintiff's challenge, if possible, to be as-applied." *Am. Fed'n of State, Cnty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 864 (11th Cir. 2013), *cert. denied*, 572 U.S. ---, 134 S. Ct. 1877 (2014). Trinity Lutheran, as the court acknowledges, frames its challenge as an attack on the Department's "customs, policies, and practices." And Trinity Lutheran specifically requests a declaration that the Department's denial of its grant application was unconstitutional. Trinity Lutheran also specifically requests injunctive relief prohibiting the Department from discriminating against it in future grant applications. *Id.* at 862 ("We look to the scope of the relief requested to determine whether a challenge is facial or as-applied in nature."). This claim and relief only implicate Trinity Lutheran. *See Doe*, 561 U.S. at 194. Consequently, Trinity Lutheran does not contend that Article I, § 7 of the

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acknowledgement" that this argument is "weak." *Ante* at 10.

Missouri Constitution is unconstitutional in all of its applications.

This brings me to *Locke*. In the face of a Free Exercise challenge, the Court upheld a college scholarship program that prevented students from using the scholarship to pursue a degree in devotional theology, a course of study that the court characterized as "akin to a religious calling as well as an academic pursuit." 540 U.S. at 715, 721, 725. The Court began with the proposition that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 719. Because the "State's disfavor of religion (if it can be called that)" in prohibiting recipients from using the scholarship to major in devotional theology "is of a far milder kind," the Court concluded that the scholarship program was not presumptively unconstitutional. *Id.* at 720. In upholding the program, the Court found that it "goes a long way toward including religion in its benefits"— for example, by allowing recipients to attend pervasively religious schools that are accredited and to take devotional-theology courses. *Id.* at 724-25. To the Court, this "relatively minor burden" was justified by a "historic and substantial state interest" of not funding "an essentially religious endeavor." *Id.* at 721, 725. This interest, the Court explained, was rooted in our nation's history of "popular uprisings against procuring taxpayer funds to support church leaders" as well as the founding-era decisions of many states to "place[ ] in their constitutions formal prohibitions against using tax funds to support the ministry." *Id.* at 721-

23. Considering this "historic and substantial state interest" alongside the "relatively minor burden," the Court found no violation of the Free Exercise Clause. *Id.* at 725.

Locke did not leave states with unfettered discretion to exclude the religious from generally available public benefits. To the contrary, Chief Justice Rehnquist's opinion for seven members of the Court was careful to acknowledge its parameters. *See id.* at 719, 725 (stating that "some" actions are permitted by the Establishment Clause but not required by the Free Exercise Clause and explaining that "[i]f any room exists between the two Religion Clauses, it must be here"). "The [*Locke*] opinion thus suggests, even if it does not hold, that the State's latitude to discriminate against religion is confined to certain 'historic and substantial state interest[s],' and does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008) (McConnell, J.) (alteration in original) (citation omitted) (quoting *Locke*, 540 U.S. at 725). *Locke* "suggests the need for balancing interests: its holding that 'minor burden[s]' and 'milder' forms of 'disfavor' are tolerable in service of 'historic and substantial state interest[s]' implies that major burdens and categorical exclusions from public benefits might not be permitted in service of lesser or less long-established governmental ends." *Id.* at 1255-56 (alterations in original) (quoting *Locke*, 540 U.S. at 720, 725). Simply put, the *Locke* Court

"indicated that the State's latitude with respect to funding decisions has limits." *Id.* at 1255.

Applying the balancing of interests contemplated by *Locke*, I conclude that Trinity Lutheran has sufficiently pled a Free Exercise violation. The disfavor of religion here is more pronounced than in *Locke*. The student in *Locke* could use his scholarship to attend a pervasively religious school that was accredited and to take courses in devotional theology there. And a pervasively religious school that received scholarship money even could require its students to take devotional-theology classes. 540 U.S. at 724-25. The program, as the Court put it, went "a long way toward including religion in its benefits." *Id.* at 724. The same cannot be said here. Trinity Lutheran has pled that the Department categorically prohibited the Learning Center from receiving a playground-surfacing grant because it is run by a church. This blanket prohibition is different in kind from the disfavor of religion that was present in *Locke*. Whereas the *Locke* program excluded religious study while also including it, *id.* at 724-25, the Department has entirely excluded the Learning Center from receiving a playground- surfacing grant. Much like the Tenth Circuit, I read *Locke* to impose some bounds on such a "wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian*, 534 F.3d at 1255.

The Department's reason for singling out the Learning Center differs from the historic and

substantial state interest in *Locke*, where the state sought to avoid paying for the training of clergy, "an essentially religious endeavor." 540 U.S. at 721-23. The sheer religiosity of this activity led the court to remark that "we can think of few areas in which a State's antiestablishment interests come more into play." *Id.* at 722. It is true that the Department's interest in enforcing Article I, § 7 of the Missouri Constitution is historic in the sense that this provision is longstanding. But the state's interest in *Locke* traced to concerns that were specific to paying for training the clergy. *Id.* at 722-23. The Court was unequivocal about this point: "[T]he only interest at issue here is the State's interest in not funding the religious training of clergy." *Id.* at 722 n.5. Here, by contrast, the Department seeks to enforce a general prohibition on aid to a church that is in no way specific to the playground-surfacing grant program. This case therefore lacks the correspondence between the past and the Department's present interest that the Court found significant in *Locke*. *Cf. id.* ("Nothing in our opinion suggests that the State may justify any interest that its 'philosophical preference' commands."); *McDaniel v. Paty*, 435 U.S. 618, 628-29 (1978) (plurality opinion) (explaining that "the American experience provides no persuasive support" for an antiestablishment concern even though several states had constitutional provisions on the topic); *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 750 F.3d 184, 195 (2d Cir. 2014) ("We do not mean to imply that merely by claiming the motivation of observing interests favored by the Establishment Clause a governmental entity gets a free pass, avoiding *all*

scrutiny."), *cert. denied*, 575 U.S. ---, 135 S. Ct. 1730 (2015).

Perhaps more importantly, the substantial antiestablishment interest identified in *Locke* is not present here. Unlike a student preparing for the ministry, which is "an essentially religious endeavor," 540 U.S. at 721, schoolchildren playing on a safer rubber surface made from environmentally-friendly recycled tires has nothing to do with religion. If giving the Learning Center a playground-surfacing grant raises a *substantial* antiestablishment concern, the same can be said for virtually all government aid to the Learning Center, no matter how far removed from religion that aid may be. When the *Locke* Court spoke of a substantial antiestablishment concern, I seriously doubt it was contemplating a state's interest in not rubberizing a playground surface with recycled tires. See *Bronx Household of Faith*, 750 F.3d at 194 ("Underlying the Board's prohibition [of hosting religious services in school facilities] is a slightly different manifestation of the same historical and constitutional aversion to the use of public funds to support the practice of religion cited by the Court in *Locke*.").

In light of the Department's negligible antiestablishment interest, I conclude that the court overstates the significance of the Department's concern about giving a grant directly to the Learning Center, rather than having the money filtered through the independent choice of private individuals. "Although private choice is one way to break the link between government and religion, it is

not the only way." *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 295 (6th Cir. 2009). Indeed, even though the playground-surfacing program involves a direct transfer of funds to the Learning Center, the court concludes that "it now seems rather clear that Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire program without violating the Establishment Clause." *Ante* at 7. I agree. *See Am. Atheists*, 567 F.3d at 295 (collecting cases to demonstrate that the Supreme Court "has sustained a number of neutral aid programs that distributed aid directly to religious organizations—without filtering the aid through private choice—where the aid itself had no religious content and any actual diversion was de minimis"). And I, of course, agree with the court that, in many cases, a concern about giving money directly to a church-run school may amount to a historic and substantial state interest. Indeed, were it to be uncovered during discovery that the Learning Center regularly uses its playground for religious activities, my Free Exercise concern would be less acute. However, at this stage of the litigation, I cannot conclude that the Department's concern about direct funding for a rubber playground surface translates into a historic and substantial antiestablishment concern.

In concluding that Trinity Lutheran has stated a claim under the Free Exercise Clause, I acknowledge that "[t]he precise bounds of the *Locke* holding . . . are far from clear." *Colo. Christian*, 534 F.3d at 1254. However, the best reading of *Locke*, in my view, is that in the absence of a historic and

substantial interest, the Department's "latitude to discriminate against religion . . . does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *See id.* at 1255. I therefore respectfully dissent from the court's affirmance of the dismissal of Trinity Lutheran's Free Exercise claim. Because this claim is linked to Trinity Lutheran's Equal Protection claim, I dissent from the court's disposition of this claim as well. *See Locke*, 540 U.S. at 720 n.3. Moreover, because I would reverse the district court's dismissal of Trinity Lutheran's complaint, I need not reach the separate question of whether the district court abused its discretion by denying Trinity Lutheran's motion to amend that complaint. *See Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 n.2 (5th Cir. 2009); *see also Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 358 n.70 (5th Cir. 1989) ("For purposes of our remand, we only point out to the trial court that the leave to amend should be freely granted and denied only upon a showing of prejudice to the other party."). I otherwise concur with this court's opinion.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14-1382

Trinity Lutheran Church, of Columbia, Inc.

Appellant

v.

Sara Parker Pauley, in her official capacity as Director of the Missouri Department of Natural Resources Solid Waste Management Program

Appellee

National Association of Evangelicals

Amicus Curiae

The Becket Fund for Religious Liberty

Amicus on Behalf of Appellant(s)

American Civil Liberties Union Foundation, et al.

Amici on Behalf of Appellee(s)

Christian Legal Society

Amicus Curiae

Appeal from U.S. District Court for the Western District of Missouri – Jefferson City
(2:13-cv-04022-NKL)

ORDER

The petition for rehearing en banc is denied by an equally divided court. The petition for panel rehearing is also denied.

Judges Riley, Smith, Colloton, Gruender and Shepherd would grant rehearing en banc.

August 11, 2015

Ordered Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
MISSOURI
CENTRAL DIVISION

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,	)	
Plaintiff,	)	No. 2:13-CV-04022-NKL
v.	)	
SARAH PARKER PAULEY, in her official capacity as Director of the Missouri Department of Natural Resources Solid Waste Management Program,	)	
Defendant.	)	

ORDER

Defendant Sara Parker Pauley, in her official capacity as Director of the Missouri Department of Natural Resources Solid Waste Management Program ("Department"), moves to dismiss the Complaint of Plaintiff Trinity Lutheran Church of Columbia, Inc. ("Trinity"). [Doc. # 9]. For the reasons

set forth below, Pauley's motion to dismiss is GRANTED and this case is DISMISSED, with prejudice.

I. Background

Trinity is a church that operates a preschool and daycare called the Learning Center. The Learning Center is a ministry of the church and incorporates daily religious instruction. Through the Learning Center, Trinity teaches a Christian world view to the children enrolled in these programs, including the Gospel. The Learning Center's policy is to admit students of any sex, race, color, religion, nationality, and ethnicity.

The Department of Natural Resources Solid Waste Management Program runs the Scrap Tire Program, which competitively awards grants to qualifying organizations for the purchase of recycled tires to resurface playgrounds. Due to the limited funds available for this program, the Department grades and ranks the applications it receives and only gives grants to those organizations that best serve the program's purposes. Both public and private nonprofit day care centers and other nonprofit entities are eligible to submit grant applications. However, the Department has a policy that prohibits organizations from participating if the applicant is owned or controlled by a church, sect or denomination of religion. It contends that this policy is consistent with Article 1, Section 7, of the Missouri Constitution which prohibits public money being used to aid religion.

Seeking to improve the safety of the surface area of its playground, Trinity, through the Learning Center, applied for a grant under the 2012 Scrap Tire Program. Trinity's grant application was graded and ranked fifth out of forty-four applications. Although a total of fourteen grants were awarded in 2012, Trinity's grant application was denied because of the Department's policy to not give grants to religious organizations.

Trinity now sues Pauley, who is named solely in her official capacity as the Director of the Missouri Department of Natural Resources Solid Waste Management Program. Trinity's Complaint claims that the denial of its grant application violated Article I, Section 7 of the Missouri Constitution, the Equal Protection Clause of the Fourteenth Amendment and the Free Exercise, Establishment and Free Speech Clauses of the First Amendment.

II. Discussion

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Pauley moves to dismiss Trinity's Complaint for failure to state a claim. When considering a motion to dismiss, the Court must accept as true the factual allegations contained in the complaint, and draw all reasonable inferences in favor of the plaintiff. *See Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655, 660 (8th Cir. 2012).

A. Missouri Constitution Article I, Section 7

Trinity claims that when the Department refused to allow it to participate in the Scrap Tire Program, the Department impermissibly discriminated against Trinity in violation of Article I, Section 7 of the Missouri Constitution. Section 7 provides "[t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof . . .; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." Mo. Const. Art. I, § 7.

Trinity relies on the second clause of Section 7 for the proposition that the Department cannot deny Trinity funding merely because it is a church as this would be discrimination toward a religious organization. Pauley counters that both parts of Section 7, the prohibition on state aid to a church and the prohibition on discrimination against a church, must be read in harmony. Since state aid to a church is prohibited in the first clause, Pauley contends that the State's refusal to give aid to religious organizations could not constitute discrimination contemplated by the second clause. Instead, the second clause prohibits preference for or discrimination between religious sects or denominations.

It is a basic rule of statutory construction that each section of a statute must be interpreted in harmony with all sections of the statute. *Frye v. Levy*, No. SD 32307, 2013 WL 1914393, at *4 (Mo.

App. S.D. May 9, 2013). The same principle applies to constitutional construction. *See Boone Cnty. Court v. State*, 631 S.W.2d 321, 324 (Mo. 1982). Section 7 contains two provisions—the prohibition on direct or indirect public aid to a church and the prohibition on discrimination against a church. Construing both clauses in harmony, it is not possible to read Section 7 to prohibit public aid to a church while concurrently considering denial of that aid to be discriminatory. Such a reading is inconsistent with the entirety of Section 7. Therefore, the Court concludes that a Missouri court addressing this issue would find that when a state complies with the directive in clause one of Section 7 (no aid to religious organizations), it does not violate the second clause (discrimination against religion). Thus, the next issue is whether the first clause of Section 7 would be violated if funding were given to Trinity.

Trinity contends that the Scrap Tire Program grants are not public funds expended in direct or indirect aid to a church and, therefore, giving it a grant would not violate the anti-aid provision of Section 7. At oral argument, Trinity put forth a "quid pro quo" theory of aid based on the premise that both parties to a contract have mutual obligations. Trinity argues that while the State provides funds for the purchase of the scrap tires and delivery, Trinity is contractually bound to promote the Scrap Tire Program and educate the public about the benefits of recycling. Indeed, Trinity argues that acceptance of the funding will actually result in a greater burden to Trinity because it must find a scrap tire vendor

and install the materials at its own cost. Additionally, Trinity contends that the receipt of such funds will actually aid the State by reducing landfills and decreasing pollution. In essence, Trinity argues that if public funding will result in additional obligations (advertising the Program and educating the public) and additional financial burdens (installing scrap tires) for the recipient, then such funding is merely quid pro quo and not public aid within the meaning of Section 7.

In developing this quid pro quo theory Trinity relies upon its reading of the Missouri Supreme Court case *Americans United v. Rogers*, 538 S.W.2d 711 (Mo. 1976). In that case, the Court upheld a state statute directing tuition grants to college students attending approved public or private colleges, including private religious colleges, so long as the educational training received was non-religious in nature. *Id.* at 713-14. The grant program did not directly pay the funds to private institutions; rather, the students received an individual check and would then endorse it over to the institution of their choice, so long as that institution had an independent board and a policy of academic freedom. *Id.* at 715, 720-21. Trinity references a passage in *Americans United* in which supporters of the tuition grant program argued that the grants did not constitute "aid" because they did not fully cover the cost of the students' education and the institutions receiving the grants did not make a profit. *Id.* at 721. In other words, according to *Americans United*, the tuition grants "were not gifts or donations by the students to the institutions, but were the quid pro

quo in return for which the institutions were contractually required to make available the opportunities for the students to obtain a college education....[T]he cost to each institution of furnishing to its students their educational opportunities is always far greater than the amount of tuition received." *Id.*

At oral argument, Trinity maintained that this passage represented the Missouri Supreme Court's holding that quid pro quo exchanges of public funding in return for obligations to utilize such funding in a prescribed manner cannot be considered "aid" under Section 7. However, Trinity grossly misrepresents the Missouri Supreme Court's analysis and holding in that case. The Missouri Supreme Court merely quoted an argument presented by supporters of the tuition grant program and did not approve or in any way advance that argument. Instead, it found that the statute in question did not violate Section 7 because the students directly received the tuition grants from the state and could only attend schools with independent boards not under the control of a religious creed or church. *Id.* at 720-21. In the interests of judicial deference to the legislative process, the Missouri Supreme Court found that the tuition grant program "embod[ied] the will of the people." *Id.* at 721. This Court has not found nor has Trinity cited any Missouri case that defines Section 7 "aid" according to Trinity's quid pro quo theory, and the Court is unpersuaded that such a definition would make any sense given the complex factual disputes and

nuanced judgments that such a definition would precipitate.

Furthermore, there is a long tradition of Missouri state courts recognizing a "high wall of separation between church and state" based on the state constitution. *A.B. v. Liberty United Methodist Church*, No. WD 59922, 2002 WL 31890054, at *5 (Mo. App. W.D. 2002). The Missouri Supreme Court has long interpreted the State's constitution to be "more 'restrictive' than the First Amendment to the United States Constitution in prohibiting expenditures of public funds in a manner tending to erode an absolute separation of church and state." *Ams. United*, 538 S.W.2d at 720; *accord St. Louis Univ. v. Masonic Temple Ass'n of St. Louis*, 220 S.W.3d 721, 729 (Mo. 2007). *See also Paster v. Tussey*, 512 S.W.2d 97, 101-02 (recognizing that the Missouri Constitution's requirement of separation of church and state is "not only more explicit but more restrictive" than that of the United States); *Berghorn v. Reorganized Sch. Dist. No. 8*, 260 S.W.2d 573, 582-83 (Mo. 1953) (finding that Missouri has an "unqualified policy...that no public funds or properties, either directly or indirectly, be used to support or sustain any school affected by religious influences or teachings or by any sectarian or religious beliefs or conducted in such a manner as to influence or predispose a school child towards the acceptance of any particular religion or religious beliefs.") (internal quotations omitted).

In light of the higher wall of separation between church and state present in the Missouri

Constitution, the Missouri Supreme Court has, on multiple occasions, strictly interpreted Section 7 to prohibit public funding of religious institutions. The Missouri Supreme Court's reasoning has persisted since its early inception in *Harfst v. Hoegen*, 163 S.W.2d 609 (Mo. 1941), where the Missouri Supreme Court asserted that Section 7 contained an "explicit interdiction of the use of public money" for religious instruction. *Id.* at 613-14. In *Harfst*, the State took over a parochial school and brought it into the public school system to be funded as such. *Id.* at 610. However, the school retained several aspects of its parochial origins, such as renting the school building from the church, employing teachers from the church, and incorporating religious curriculum into daily instruction. *Id.* at 614. The teachers expressly acknowledged that their faith required them to instruct the students in the tenets of their religion. *Id.* at 614. The Missouri Supreme Court held that the use of public funds for this school would violate Section 7, stating that the "constitutional policy of our State has decreed the absolute separation of church and state, not only in governmental matters, but in educational ones as well." *Id.*

The Missouri Supreme Court has followed this line of reasoning to find various categories of public aid to religious institutions impermissible that may have otherwise been allowed under the Federal Constitution. For example, it deemed the use of public funds to transport students to parochial schools to be unconstitutional in *McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953), while the United States Supreme Court upheld a similar statute in New

Jersey in *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947). Similarly, while the Missouri Supreme Court found a statute that required the use of public funds to purchase textbooks for students and teachers in private non-profit elementary and secondary schools, including parochial institutions, to be unconstitutional in *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974), the United States Supreme Court has found no violation under the Federal Constitution. *See, e.g., Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968).

Trinity argues, however, that the Missouri Supreme Court's long-held "high wall" has begun to crumble in recent years. Trinity primarily relies upon the Missouri Supreme Court's decision in *St. Louis University v. Masonic Temple Association of St. Louis*, 220 S.W.3d 721 (Mo. 2007), to support its proposition that "public monies have gone to churches and religious organizations with the blessing of the state." [Doc. #20 at 18]. However, this statement mischaracterizes the Missouri Supreme Court's holding in that case. The City of St. Louis granted St. Louis University public aid through tax increment financing ordinances for the construction of a new arena. *Id.* at 724. The Missouri Supreme Court found these ordinances to be constitutional after first determining that, under Article I, Section 7 and Article IX, Section 8,[1] St. Louis University was

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[1] The Court has often interpreted Article I, Section 7 alongside Article IX, Section 8, which provides that "[n]either the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make

not controlled by a religious creed and therefore the with the Jesuits, in practice an independent institution.

The Missouri Supreme Court's holding in *St. Louis University* reflects a consistent recognition of the unique circumstances involved in the State's relationship with private institutions of higher education, many of which have historical ties with a particular denomination of religion. Thirty years earlier in *Americans United*, the Missouri Supreme Court upheld a tuition grant aid program to students who attended public or private colleges and universities after finding that the institutions needed to have independent boards and policies of academic freedom. 538 S.W.2d at 720-21. It stressed that student attendance at private colleges and universities "does not have the same religious implications or significance" found in elementary or secondary schools. *Id.* at 721. It distinguished its decision from the prior "parochial school cases," such as *Harfst*, by emphasizing that "institutions of higher education are able to boast of academic freedom, institutional independence, objective instruction, lack of indoctrination, faculty autonomy, mature students, and a diversity of religious

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an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever:...." Mo. Const. art. IX, § 8. Missouri courts often construe these two sections together to represent Missouri's establishment clause. *See, e.g., St. Louis Univ.*, 220 S.W.3d at 725.

background in faculty and students." *Id.* at 722 (internal quotations omitted).

The Missouri Supreme Court's decisions in *Americans United* and *St. Louis University* are not examples of public aid to religious institutions with the "blessing of the state," as characterized by Trinity's counsel. Rather, these cases can be distinguished from Missouri jurisprudence regarding the high wall of separation between church and state in two distinct ways. First, the Missouri Supreme Court in both cases makes clear that the religious institutions receiving aid, indirectly through the students in *Americans United* and through the developer in *St. Louis University*, were not controlled by a church or religious creed. This stands in contrast to the facts in *Harfst*, *McVey*, and *Paster*, in which the institutions receiving aid were parochial or former parochial schools under the control of the church. Second, the schools in *Americans United* and *St. Louis University* were institutions of higher education. Although the Missouri Constitution makes no explicit distinction between institutions of higher education and primary or secondary schools in Article I, Section 7, the Missouri Supreme Court has, on several occasions, considered it to be a relevant factor. In *Americans United*, for example, it emphasized the differences between parochial elementary and secondary schools on the one hand and universities on the other, based on the fact that the latter had greater academic freedom, mature students, and secular curriculum. *See also Menorah Med. Ctr. v. Health & Educ. Facilities Auth.*, 584 S.W.2d 73, 87 (Mo. 1979) (considering recipient

universities' status as institutions of higher education, "as opposed to elementary or secondary level," to be a factor in finding no excessive entanglement in a financing program authorized by state law and operated by a non-state entity). This distinction between institutions of higher education and primary or secondary schools emphasizes the Missouri Supreme Court's concern with the degree of control a church, creed, or religious domination may have over the administration, management, and curriculum development at a school. When that degree of control was so great that the school was, in essence, serving as a proxy or branch of the church, the Missouri Supreme Court has consistently held that public aid, direct or indirect, would be impermissible.

Thus, the allegations in Trinity's complaint show that public funding through the Scrap Tire Program would be impermissible under Section 7. First, the Learning Center, which merged with Trinity in 1985, today remains part of and run by the Church. Trinity alleges that the Learning Center is a "ministry" of the Church that directly instructs students in the Church's religious beliefs. Particularly, Trinity notes the "[t]he Church has a sincere religious belief to be associated with the Learning Center and to use it to teach the Gospel to children of its members, as well to bring the Gospel messages to non-members." [Doc. #1 at 4]. Unlike the colleges and universities in *St. Louis University* or *Americans United*, the Church controls the Learning Center. It utilizes religious curriculum in daily activities in its pre-school and daycare by

"teaching a Christian world view." *Id.* Its students are children, not mature adults instructed by faculty with diverse religious backgrounds. By all indications, Trinity has pled that its Learning Center is a part of the Church and is used to inculcate its religious beliefs to children in the pre-school and daycare. Missouri courts have consistently held that public aid to such an organization is prohibited under the State constitution.

In conclusion, Section 7 clearly prohibits public money from, directly or indirectly, going to aid a church, sect, or denomination of religion. Trinity's own pleadings demonstrate that funds from Pauley's department in the form of the Scrap Tire Program would aid the Church and its ministry Learning Center within the meaning of Missouri law. As the Missouri Constitution prohibits such aid, the Department's refusal to grant it cannot be considered discrimination under Section 7. To hold otherwise would permit the second half of the section to obviate the first, in that complying with the prohibition of aid to a church would violate the prohibition on discrimination against a church. Thus, Trinity's claims based on the Missouri Constitution must fail.

This conclusion also obviates Trinity's claim during oral argument that discovery is necessary regarding the State's legitimate interest in denying Trinity's grant application. The Court has rejected Trinity's interpretation of "aid" as it is used in Article 7, so discovery about the benefits and

burdens of the scrap metal program are not relevant. Trinity's counsel also sought discovery about whether the State consistently complies with Article 7, but Trinity has failed to identify any evidence that might support its claim, nor has it shown that a state could ever forfeit its interest in complying with its own laws.

B. Free Exercise

Pauley also argues that Trinity's Complaint fails to state a claim for a violation of the Free Exercise Clause of the First Amendment because Trinity and its members were not prevented from exercising any religious practice, merely because they could not get funding from the State.

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. Amend. I. With respect to this clause, the Supreme Court has explained, "[t]he crucial word in the constitutional text is 'prohibit.' For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). Put differently, this clause provides "'protection from certain forms of governmental compulsion,'" *United States v. Means*, 858 F.2d 404, 406 (8th Cir. 1988) (quoting *Bowen v. Roy*, 476 U.S. 693, 700 (1986)), but generally does not provide a basis for "[d]emands for affirmative

governmental assistance," *United States v. Friday*, 525 F.3d 938, 957 (10th Cir. 2008). *See also Sherbert*, 374 U.S. at 412 (Douglas, J., concurring) ("The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them."). As Trinity's claim is based solely on the denial of an affirmative benefit, Pauley argues that the Complaint fails to state a claim for a violation of the Free Exercise Clause.

In response, Trinity argues that the Free Exercise Clause is implicated in this case because the decision to deny Trinity's grant application targeted Trinity for disparate treatment on the basis of religion. In support, Trinity cites a string of cases, beginning with *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993), which hold that, under the Free Exercise Clause, a court must strictly scrutinize any law that burdens religious practice and is not neutral and generally applicable. Trinity maintains that strict scrutiny applies in this case because the policy of not awarding grants to sectarian institutions is not neutral and generally applicable and that this policy cannot withstand strict scrutiny review. However, as discussed in detail below, Trinity's Free Exercise claim erroneously conflates what a state may do without violating the Establishment Clause of the First Amendment with what a state must do under the Free Exercise Clause.

In each of the cases cited by Trinity to support its Free Exercise claim, the ordinance or regulation at issue directly prohibited or restricted the exercise of a religious practice. *See, e.g.*, *Lukumi*, 508 U.S. at 542, 547 (1993) (invalidating a series of ordinances that prohibited the ritual slaughter of animals, which "had as their object the suppression of religion."); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 167-68 (3d Cir. 2002) (finding that the discriminatory enforcement of an ordinance, which was selectively applied to prohibit the Orthodox Jewish practice of hanging *lechis* while permitting other, comparable secular and non-secular hangings, "violate[d] the neutrality principle of *Lukumi*"); *Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) (holding that a series of Army regulations were not neutral where the regulations "uniformly ban[ned] all religious practice"); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232-34 (11th Cir. 2004) (finding that a zoning ordinance that excluded religious groups from a certain district but not similarly situated secular groups "improperly targeted religious assemblies"). By contrast, the denial of an affirmative benefit from the government "is of a 'wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications.'" *Means*, 858 F.2d at 407 (quoting *Roy*, 476 U.S. at 704); *see also Johnson v. Robison*, 415 U.S. 361, 385-86 (1974) ("The withholding of educational benefits involves only an incidental burden upon appellee's free exercise of religion—if, indeed, any burden exists at all.").

As a result, the present case is decidedly more analogous to *Locke v. Davey*, 540 U.S. 712, 715 (2004), wherein the Supreme Court upheld the state of Washington's decision to exclude students pursuing degrees in devotional theology from its Promise Scholarship Program. This program provided postsecondary students with state-funded scholarships for educational expenses, provided that the students met certain requirements. *Id.* at 715. Each year, the funds available for the program were "evenly prorated among the eligible students." *Id.* 716. In accordance with Washington's constitutional prohibition on providing grants to students pursuing degrees "that are 'devotional in nature or designed to induce religious faith,'" eligible students were precluded from using the scholarship to pursue a degree in theology. *Id.* After the plaintiff in *Locke* was denied a Promise Scholarship due to his decision to pursue a devotional degree, the student filed suit, alleging, *inter alia*, a violation of the Free Exercise Clause. *Id.* at 717-18. The district court granted summary judgment in favor of the State and the Court of Appeals for the Ninth Circuit reversed, finding that, under *Lukumi*, strict scrutiny applied because the State had targeted religion for unfavorable treatment. *Id.* at 718.

The Supreme Court reversed, holding that "such an exclusion from an otherwise inclusive aid program does not violate the Free Exercise Clause of the First Amendment." *Id.* at 715. The Court began by reiterating that, while the two Religion Clauses "are frequently in tension," its precedents have "long said that there is room for play in the joints between

them," meaning "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718-19 (quotation omitted). In upholding the plaintiff's exclusion from the scholarship program, the Supreme Court considered and rejected the plaintiff's argument that, under *Lukumi*, the scholarship program "is presumptively unconstitutional because it is not facially neutral with respect to religion." *Id.* at 720. The Supreme Court reasoned that accepting this claim "would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning." *Id.* at 720. On this point, the Supreme Court went on to explain:

> In *Lukumi*, the city of Hialeah made it a crime to engage in certain kinds of animal slaughter. We found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion. . . . In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. . . . And it does not require students to choose between their religious beliefs and receiving a government benefit... The State has merely chosen not to fund a distinct category of instruction.

Id. at 720-21. Accordingly, because this scholarship program did not "evinc[e] the hostility toward

religion which was manifest in *Lukumi*," the Court could not "conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect." *Id.* at 724-25. "Without a presumption of unconstitutionality," the Court held, this "claim must fail." *Id.* at 725.

Trinity argues that *Locke* is distinguishable because the holding in *Locke* was explicitly limited to funding the religious training of clergy, and the *Locke* decision was based, at least in part, on a longstanding aversion to using tax dollars to fund the ministry and the concomitant finding that there are "few areas in which a State's antiestablishment interests come more into play." *Id.* at 722-23. But this does not mean that the reasoning of *Locke* is inapplicable in other contexts. *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1254 (10th Cir. 2008) ("[W]e are disinclined to think that *Locke* is confined to its facts. . . . Presumably, there are other forms of state decisions not to fund religious instruction that would pass muster under the Free Exercise Clause beyond the clergy training involved in *Locke*."); *Eulitt ex rel. Eulitt v. Me., Dep't of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004) ("The appellants endeavor to cabin [*Locke*] and restrict its teachings to the context of funding instruction for those training to enter religious ministries. Their attempt is unpersuasive. We find no authority that suggests that the room for play in the joints identified by the [*Locke*] Court, . . . is applicable to certain education funding decisions but not others." (quotation omitted)).

Furthermore, Trinity's attempt to distinguish *Locke* on this basis is particularly unpersuasive here, because this case raises antiestablishment concerns that are at least comparable to those relied on by the Court in *Locke*. In particular, Trinity ultimately seeks the direct payment of government funds to a religious institution. Unlike in *Locke*, where "the link between government funds and religious training [was] broken by the independent and private choice of recipients" and so there was "no doubt" that the state could have provided scholarships to students pursuing devotional degrees without offending the Establishment Clause, *id.* at 719, the grant at issue in this case would be paid directly to a religious preschool and daycare. The Supreme Court has repeatedly and consistently cautioned that "special Establishment Clause dangers" arise "where the government makes direct money payments to sectarian institutions." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995); *accord Mitchell v. Helms*, 530 U.S. 793, 818-19 (2000); *see also Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 11 (1947) (examining the historical origin of the First Amendment and concluding that "[t]he imposition of taxes to pay ministers' salaries *and to build and maintain churches and church property* aroused [the colonists'] indignation. It was these feelings which found expression in the First Amendment." (emphasis added)). As a result, Supreme Court precedent draws "a consistent distinction between government programs that provide aid directly to religious schools, . . . and programs of true private choice, in which government aid reaches religious schools only

as a result of the genuine and independent choices of private individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (citations omitted). While it is well-established that the latter is generally permissible, *id.*, "[i]t is equally well-settled . . . that the State may not grant aid to a religious school, whether cash or inkind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State." *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487, (1986) (citing, *inter alia*, *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)).

In *Nyquist*, for instance, the Supreme Court held that a New York statute that provided for direct money grants to sectarian schools to be used for the maintenance and repair of school facilities violated the Establishment Clause. *Nyquist*, 413 U.S. at 774-80. The Supreme Court based its decision largely on the fact that the statute did not "restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes." *Id.* at 774 ("Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities."). After a thorough review of its precedent on this issue, the Supreme Court concluded:

> If tax-raised funds may not be granted to institutions of higher learning where the possibility exists that those funds will be

> used to construct a facility utilized for sectarian activities 20 years hence, a fortiori they may not be distributed to elementary and secondary sectarian schools for the maintenance and repair of facilities without any limitations on their use. If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair.

Id. at 413 776-77; *see also Freedom from Religion Found., Inc. v. Bugher*, 249 F.3d 606, 613-14 (7th Cir. 2001) (holding that, under *Nyquist*, a Wisconsin program that provided direct grants to sectarian schools for the purpose of subsidizing telecommunications access violated the Establishment Clause because the money could be used "for connection time to view a religious website"). There is no reason to suspect that this rule is any less applicable where the facility in question belongs to a preschool or daycare.[2]

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[2] If anything, providing direct aid to a religious preschool is less likely to withstand an Establishment Clause challenge. In *Tilton v. Richardson*, 403 U.S. 672, 674-75, 689 (1971), a plurality upheld the provision of government grants to sectarian colleges and universities for the construction of buildings, provided that the buildings were used exclusively for secular purposes. In reaching this conclusion, however, the plurality emphasized that:

> There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and

Trinity has not claimed that its playground is used exclusively for secular purposes and the allegations in its Complaint suggest that it is not. According to the Complaint:

> The Learning Center is a ministry of the Church and incorporates daily religion and developmentally appropriate activities into a school and optional daycare program. [ ] Through the Learning Center, the Church teaches a Christian world view to children of members of the Church, as well as children of non-member residents of Boone County

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secondary schools. The affirmative if not dominant policy of the instruction in pre-college church schools is to assure future adherents to a particular faith by having control of their total education at an early age... There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. . . . Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students. . . . Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities.

Id. at 685-86, (quotation and citation omitted).

> and the surrounding area. . . . The Church has a sincere religious belief to be associated with the Learning Center and to use it to teach the Gospel to children of its members, as well as to bring the Gospel message to non-members.

[Doc. # 1 at 4]. It is thus clear from the face of the Complaint that religious instruction is a central element of the preschool and daycare offered through the Learning Center, and there is nothing in the Complaint to suggest that this instruction does not extend to the playground.

Thus, using taxpayer-raised funds to refurbish Trinity's playground, no matter how innocuous, raises Establishment Clause concerns even if such use of funds would not violate the Establishment Clause. *See Nyquist*, 413 U.S. at 780 ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid. . . . 'No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.'" (quoting *Everson*, 330 U.S. at 16); *see also Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1098 (8th Cir. 2000) ("[S]ection 4454 does not cause government aid to flow to 'pervasively sectarian institutions,' the funding of which constitutes an improper benefit to religion. . . . A pervasively sectarian institution is one in which

religion so pervades its functions that *any* government aid it receives, *even if designated for secular activities*, impermissibly assists religion because the institution is unable to separate the funded secular activities from its religious mission." (emphases added)):[3] *Strout v. Albanese*, 178 F.3d 57, 63 (1st Cir. 1999) ("The historic barrier that has existed between church and state throughout the life of the Republic has . . . acted as an insurmountable impediment to the *direct* payments or subsidies by the state to sectarian institutions, particularly in the context of primary and secondary school.").

That said, the question of whether awarding a scrap tire grant directly to Trinity would violate the Establishment Clause is not at issue in this case, and so it is neither necessary nor appropriate to resolve this question here. Nonetheless, the existence of a longstanding and legitimate antiestablishment

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[3] Though heavily criticized by the plurality opinion in *Mitchell v. Helms*, 530 U.S. 793 (2000), the pervasively sectarian test remains the test that this Court, under both Supreme Court and Eighth Circuit precedent, is bound to apply. *See Min De Parle*, 212 F.3d at 1098; *Steele v. Indus. Dev. Bd. Of Metro. Gov't Nashville*, 301 F.3d 401, 408 (6th Cir. 2002) (concluding that, although "[t]he vitality of the pervasively sectarian test is questionable in light of *Mitchell*, because "*Mitchell* is a plurality opinion. . . .the district court, and this Court, are still bound by pre-*Mitchell* law with regard to the pervasively sectarian doctrine. . . .Further, the Supreme Court has specifically stated that the lower courts are to treat its prior cases as controlling until the Supreme Court itself specifically overrules them. . . .It is for the Supreme Court, not this Court, to jettison the pervasively sectarian test, which it has not done.").

interest makes this case nearly indistinguishable from *Locke*. As a result, even assuming that providing a tire scrap grant to Trinity would not violate the Establishment Clause, this Court cannot conclude that the exclusion of a religious preschool from this aid program is constitutionally suspect under the Free Exercise Clause in light of the longstanding and substantial concerns about direct payment of public funds to sectarian schools. *Cf. Locke*, 540 U.S. at 725 (determining that "there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology," but nonetheless holding that "[g]iven the historic and substantial state interest at issue, we [] cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect."); *Eulitt ex rel. Eulitt*, 386 F.3d at 355 (concluding that the *Locke* Court "recognized that state entities, . . . may act upon their legitimate concerns about excessive entanglement with religion, even though the Establishment Clause may not require them to do so.").

As in *Locke*, the exclusion from the tire scrap grant program places a relatively minor burden on Trinity. *Cf. Locke*, 540 U.S. at 720 ("In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. . . . [T]he exclusion of such funding places a relatively minor burden on Promise Scholars."). In fact, unlike the scholarships in *Locke*, which each applicant who met the basic requirements was guaranteed to receive, *id.* at 716, the tire scrap grants are competitively awarded

because of the limited funds available for the program. [Doc. # 1 at 6]. According to the Complaint, only fourteen of the forty-four applicants received tire scrap grants in the year Trinity applied. [Doc. # 1 at 6]. As a result, Trinity is no worse off than any of the thirty, secular institutions that applied for grants and did not receive them.

Furthermore, it is not unreasonable that the state of Missouri, in determining how to apportion the limited funds available for this program, would choose to exclude a religious preschool and daycare based on antiestablishment concerns arising under both the First Amendment[4] and its own, significantly more restrictive Constitution. Nothing in the Complaint suggests that the decision to deny Trinity's grant application was motivated by hostility toward religion as opposed to a legitimate interest in avoiding government entanglement with religion. Furthermore, "it would be illogical to impose upon government entities a presumption of hostility [toward religion] whenever they take into account plausible entanglement concerns in making decisions in areas that fall within the figurative space between the Religion clauses. *Eulitt ex rel. Eulitt*, 386 F.3d at 355.

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[4] While the Locke Court characterized the State of Washington's interest in not funding the religious instruction of future clergy as "substantial," Locke, 540 U.S. at 725, the Court has also suggested "that the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (quoting *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)).

Finally, while there is comparatively little authority directly addressing this issue, lower courts have consistently rejected Free Exercise claims in analogous circumstances. In *Strout*, for instance, the First Circuit upheld a statute that offered grants directly to private educational institutions, provided that they were "non-sectarian," to subsidize the education of students residing in communities without public education facilities. *Strout*, 178 F.3d at 59. In upholding the prohibition on providing subsidies directly to religious schools attended by students who otherwise qualified for the grants, the *Strout* court considered and rejected the claim that this restriction violated "the Free Exercise Clause... because it excludes funding of sectarian education solely on the basis of religion." *Id.* at 65. The *Strout* court reasoned that the Free Exercise Clause was "not implicated" in this context because the decision not to subsidize sectarian schools in no way prevented students from attending religious schools; "[a]ll it means is that the cost of religious education must be borne by the parents and not the state." *Id.* The *Strout* court also concluded that the Supreme Court's decision in *Lukumi* was "inapposite," because there had not been any suggestion that the restriction on subsidies to sectarian schools was motivated by "a substantial animus" against religion. *Id.* Following the Supreme Court's decision in *Locke*, the First Circuit had cause to revisit its decision in *Strout* and concluded that "recent Supreme Court jurisprudence reinforces rather than undermines *Strout's* conclusion that [the challenged statute] perpetrates no free exercise violation." *Eulitt ex rel. Eulitt*, 386 F.3d at 356.

Similarly, in *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376, 378 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974), a three judge panel, with one judge dissenting, rejected the claim that the state of Missouri's decision to provide bus transportation for students attending public but not parochial schools violated the Free Exercise Clause. The plaintiffs in *Luetkemeyer* argued, as Trinity does here, that the denial of this benefit "force[d] them to forego the exercise of their right to freely exercise their religion in order to secure a public benefit, and penalize[d] the free exercise of religion in violation of the First Amendment." *Id.* at 377-78. In rejecting this contention, the court first reasoned that "[p]rinciples which state what a State *may* do may not properly be read as a command to what a State *must* do." *Id.* at 381; *accord McCarthy v. Hornbeck*, 590 F. Supp. 936, 943 (D. Md. 1984). For support, the *Luetkemeyer* court relied on the Supreme Court's decision in *Norwood v. Harrison*, 413 U.S. 455, 462 (1973), wherein "[t]he Appellees intimate[d] that the State must provide assistance to private schools equivalent to that which it provides to public schools." In response, the *Norwood* Court ruled:

> Clearly, the State need not. Even as to church-sponsored schools, whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication, in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The Religion Clauses of the First Amendment strictly confine state aid to

> sectarian education. Even assuming, therefore, that the Equal Protection Clause might require state aid to be granted to private nonsectarian schools in some circumstances—health care or textbooks, for example—a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance.

Norwood, 413 U.S. at 462. Based on this reasoning and Missouri's "long history of maintaining a very high wall between church and state," the *Luetkemeyer* court concluded "that the Constitution of the United States does not compel the state of Missouri to provide equal transportation services to private and church-sponsored schools and that it may, as it has, elect to provide such service only for its public schools." *Luetkemeyer*, 364 F. Supp. at 387.

Two years earlier, in *Brusca v. Missouri ex rel. State Board of Education*, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd sub nom.*, *Brusca v. State Board of Education*, 405 U.S. 1050 (1972), a three judge panel for the Eastern District of Missouri unanimously reached the same conclusion. The plaintiffs in *Brusca* claimed that Missouri's constitutional prohibition on the use of public funds to aid sectarian schools impaired their free exercise rights and denied them equal protection under the law. *Id.* at 276. In concluding that the First Amendment did not require equal allocation of public assistance to secular and religious schools, the *Brusca* court first remarked, "The issue presented . . . is not so much

what Missouri *may* do but what it *must* do in aid of religious education." *Id.* From here, the court reasoned:

> [A] parent's right to choose a religious private school for his children may not be equated with a right to insist that the state is compelled to finance his child's non-public school education in whole or in part in order that he may obtain a religious education. . . [T]o the extent the Religion Clauses of the First Amendment do not prohibit such financial aid, they do not require that it be given by the State. . . .We find nothing arbitrary or unreasonable in the determination of the State to deny its funds to sectarian schools or for religious instruction.

Id. at 277, 279. In an analogous case, on appeal from the Central District of California's decision entering judgment for the state of California, the Ninth Circuit "deferred decision . . . awaiting the outcome of the appeal in *Brusca*." *Jackson v. California*, 460 F.2d 282, 283 (9th Cir. 1972) (per curiam). After the Supreme Court affirmed, the Ninth Circuit, "[o]n authority of *Brusca*," affirmed the district court's decision. *Id.*

Other courts, often citing *Brusca* and *Luetkemeyer*, have consistently reached the same conclusion. For instance, in rejecting the claim that not providing tax credits for educational expenses to parents of students attending religious schools, the Southern District of Ohio reasoned:

> While the state may grant secular, neutral, non-ideological aid to sectarian school students when such aid is granted in common to all students, . . . no *right* to such aid under the Free Exercise Clause has been established in our constitutional matrix. The broad construction of the Free Exercise Clause urged upon us by the state would for all practical purposes, render meaningless the thrust and import of the Establishment Clause. . . . [The Free Exercise Clause] has never been interpreted as placing an affirmative duty upon the state to appropriate money so that religious beliefs might be more effectively exercised or the continuing vitality of religious institutions ensured. . . The adoption of such a view would mark a profound and radical departure from the philosophy of separation of Church and State which has characterized this country from its very inception.

Kosydar v. Wolman, 353 F. Supp. 744, 764-65 (S.D. Ohio 1972), *aff'd sub nom., Grit v. Wolman*, 413 U.S. 901 (1973); *accord Valencia v. Blue Hen Conference*, 476 F. Supp. 809, 824 (D. Del. 1979) ("[W]hile the State May, without violating the Establishment Clause, provide some secular benefits which incidentally relieve the burdens assumed by parents who choose to send their children to parochial schools, it is not required to do so by the Free Exercise Clause."), *aff'd*, 615 F.2d 1355 (3d Cir. 1980); *see also McCarthy*, 590 F. Supp. at 945-46 ("The Supreme Court has consistently held that a

statute does not impinge on a constitutional right merely because it does not subsidize that right. . . . Subsidization by the state of Maryland of plaintiffs' constitutional right to send their children to church-related schools is not mandated by the First Amendment."). Against this authority, Trinity has not presented a single case that supports the proposition that the State, in establishing a program that offers grants to public and private institutions engaged in early childhood care and education, is constitutionally required to include religious institutions in the program if their inclusion would not violate the Establishment Clause.

To the extent that Trinity suggests that this case is analogous to *Sherbert*, wherein the Supreme Court held that a State may not apply the provisions governing eligibility for public welfare benefits "so as to constrain a worker to abandon her religious convictions respecting the day of rest," *Sherbert*, 374 U.S. at 410, the *Luetkemeyer* court aptly explained why the narrow holding in *Sherbert* is inapplicable in this context:

> *Sherbert* involved a request for dispensation from a general regulatory law; not a request or demand for a public service. While the exemption or dispensation would clearly result in some aid to a particular individual, it did not involve the expenditure of state funds which would, in fact, indirectly aid a religious institution. The Court simply did not have the latter question before it. Justice Douglas appropriately pointed out in his

> concurring opinion, that 'this case does not involve the problems of direct or indirect state assistance to a religious organization.'"

Luetkemeyer, 364 F. Supp. at 385 (citation omitted); *accord Brusca*, 332 F. Supp. at 279 ("Nothing in *Sherbert* . . . , relied on by plaintiffs, suggests a different result or implies that a state must finance or subsidize religious schools. That case did not involve any issue of direct or indirect state assistance to a religious organization."); *see also Sherbert*, 374 U.S. at 409 ("[T]he extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."). *Sherbert* has never been extended to require that religious institutions be given equal access to government funds and, absent some authority, the Court cannot adopt such an unprecedented rule here.

In conclusion, even assuming that providing a tire scrap grant to Trinity would not violate the Establishment Clause (an issue not before the Court), there is no basis for concluding that the decision to exclude religious institutions from this program did violate the Free Exercise Clause. Accordingly, Trinity's Free Exercise claim is dismissed.

C. Equal Protection

Having concluded that the Complaint fails to allege a violation of the Free Exercise Clause, Trinity's Equal Protection claim must also be dismissed. The *Locke* Court rejected the plaintiff's Equal Protection claim in a footnote, reasoning that "[b]ecause we hold, . . . that the program is not a violation of the Free Exercise Clause, . . . we apply rational-basis scrutiny to his equal protection claims." *Locke*, 540 U.S. at 720 n.3; *accord Johnson*, 415 U.S. at 375 n.14 (1974). Applying rational-basis review, the *Locke* Court easily found that Washington's scholarship program survived this level of scrutiny for the same reasons that it did not violate the Free Exercise Clause. *Locke*, 540 U.S. at 720 n.3.

From the allegations in the Complaint, it is clear that the decision to exclude religious organizations from participation in the Tire Scrap Program withstands rational-basis review. According to Trinity, the letter that explained the decision to deny Trinity's grant application stated:

> [A]fter further review of applicable constitutional limitations, the department is unable to provide this financial assistance directly to the church as contemplated by the grant application. Please note that Article I, Section 7 of the Missouri Constitution specifically provides that 'no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion.'

[Doc. # 1 at 6]. Thus, as in *Locke*, Trinity's exclusion from the aid program in this case was based on the Missouri Constitution's heightened separation of church and state. *Cf. id.* at 716. Whether characterized as "substantial," *id.* at 725, or "compelling," *Luetkemeyer*, 364 F. Supp. at 386, the antiestablishment concerns that motivated this decision, based on Trinity's own allegations, at least bears "a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993). This holds true regardless of whether providing Trinity with a grant would actually violate the Establishment Clause. *See Locke*, 540 U.S. at 719, 725 (finding that Washington had a "substantial" antiestablishment interest, despite the fact that there was "no doubt" that the State could have provided the scholarship in question without violating the Establishment Clause). Accordingly, Trinity's Equal Protection claim must be dismissed.

D. Establishment

Trinity's Establishment Clause claim is premised on the theory that the decision not to award Trinity a grant evinced hostility toward religion, in violation of the neutrality toward religion mandated by the Establishment Clause. None of the cases cited by Trinity, however, supports the proposition that the Establishment Clause entitles Trinity to relief in this case.

Specifically, in support of its theory, Trinity relies on two Supreme Court cases concerning

student access to school resources and facilities that were ultimately decided on free speech or statutory grounds. *See Rosenberger*, 515 U.S. at 822-836 (holding that the University of Virginia's exclusion of religiously motivated student publications from a policy that paid the printing costs of a variety of student publications constituted viewpoint discrimination in violation of the students' right of free speech); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. at 235-47 (holding that a public high school's refusal to officially recognize a Christian club violated the Equal Access Act, 20 U.S.C. §§ 4071-4074 and explicitly declining to "decide—and therefore express[ing] no opinion on—whether the First Amendment requires the same result."). In each of these cases, the Establishment Clause was only considered from the perspective of whether it prohibited the school from providing the funds or access that the students sought. *See Rosenberger*, 515 U.S. at 837-38; *Mergens*, 496 U.S. at 247-48. Neither of these cases can plausibly be read as requiring the State to provide a religious institution with a publicly funded subsidy by virtue of the neutrality toward religion generally required under the Establishment Clause.

Furthermore, in the only case of which the Court is aware that has directly addressed this issue, the First Circuit considered and rejected the same theory advanced by Trinity. *See Strout*, 178 F.3d at 60 ("[P]laintiff-appellants argue that the statute, . . . violates the Establishment Clause because, rather than treating religion neutrally, it demonstrates a hostility toward religion . . . ."). In concluding that

the plaintiffs' reliance on *Rosenberger* was "misplaced," the *Strout* court found "[m]ost telling . . the majority's analysis of the issues presented by that appeal." *Id.* at 63. Specifically, the *Rosenberger* Court had explained,

> The Court of Appeals (and the dissent) are correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions, ... The error is not in identifying the principle, but in believing that it controls this case. . . . [T]he Court of Appeals decided a case that was, in essence, not before it, and the dissent would have us do the same. *We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity.* . . . [T]he undisputed fact [is] that no public funds flow directly to WAP's coffers.

Rosenberger, 515 U.S. at 842 (citations omitted) (emphasis added). Thus, the *Rosenberger* Court's conclusion that it does not violate the Establishment Clause to provide religious and secular student groups with "access to [ ] facilities on a religion-neutral basis," *id.*, can in no way be interpreted as imposing an affirmative obligation to provide direct subsidies to religious institutions. *Mergens* is distinguishable for the same reason.

As the *Strout* court persuasively reasoned, "In lauding neutrality as the keystone of Establishment Clause jurisprudence, plaintiff-appellants forget that neutrality is but one 'hallmark of the Establishment Clause.' *Rosenberger* neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence." *Strout*, 178 F.3d at 63 (quoting *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring)). The Strout court went on to conclude:

> [W]e are at a loss to understand why plaintiff-appellants believe that the Establishment Clause gives them a basis for recovery. The Establishment Clause forbids the making of a law respecting the establishment of any religion. There is *no* relevant precedent for using its negative prohibition as a basis for extending the right of a religiously affiliated group to secure state subsidies.

Id. at 64. Likewise, in this case, Trinity has not cited, and the Court's independent research has not revealed, a case construing the Establishment Clause in the manner urged by Trinity. Accordingly, there is no basis for concluding that Trinity is entitled to relief under the Establishment Clause and this claim must be dismissed.

E. Free Speech

Neither party ever substantively addressed Trinity's claim that the denial of its grant application violated its right to free speech under the

First Amendment. In rejecting the plaintiff's free speech claim in *Locke*, the Court reasoned:

> [T]he Promise Scholarship Program is not a forum for speech. The purpose of the Promise Scholarship Program is to assist students from low- and middle-income families with the cost of postsecondary education, not to encourage a diversity of views from private speakers. . . . Our cases dealing with speech forums are simply inapplicable.

Locke, 540 U.S. at 720 n.3; *accord Eulitt ex rel. Eulitt*, 386 F.3d at 356-57 ("The statute at issue here does not implicate the appellants' speech rights at all. As the Supreme Court made clear in *Davey*, state programs to fund general tuition costs are not fora for speech. . . . The Maine education plan deals with the provision of secular secondary educational instruction to its residents; it does not commit to providing any open forum to encourage diverse views from private speakers. Consequently, cases dealing with speech fora . . . are not relevant.").

Trinity presents no argument or authority that suggests a different result is warranted where the government program in question is designed to encourage and assist the use of scrap tires to refurbish playgrounds. There is simply no basis for concluding that the Tire Scrap Program is designed to provide an open forum encouraging diverse views from private speakers. Accordingly, for the reasons set forth in *Locke* and *Eulitt*, the Complaint fails to state a claim for a violation of Trinity's right to free

speech under the First Amendment and this claim must be dismissed.

III. Conclusion

For the foregoing reasons, Defendant Pauley's motion to dismiss, [Doc. # 9], is GRANTED and this case DISMISSED, with prejudice.

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: September 26, 2013
Jefferson City, Missouri

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
CENTRAL DIVISION

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,	)	
Plaintiff,	)	No. 2:13-CV-04022-NKL
v.	)	
SARAH PARKER PAULEY, in her official capacity as Director of the Missouri Department of Natural Resources Solid Waste Management Program,	)	
Defendant.	)	

ORDER

Plaintiff Trinity Lutheran Church of Columbia, Inc. ("Trinity") has filed a motion to reconsider and for leave to file an amended complaint. [Doc. #36]. For the reasons set forth below, Trinity's motion is DENIED.

I. Background

This case concerns the denial of Trinity's application for a grant under the Missouri Department of Natural Resources Solid Waste Management Program's Scrap Tire Program, which competitively awards grants to qualifying organizations for the purchase of recycled tires to resurface playgrounds. On September 26, 2013, the Court dismissed each of the five counts in Trinity's Complaint for failing to state a claim. A more thorough account of the relevant factual background is set forth in the Court's prior order. *See* [Doc. # 34 at 1-2].

Trinity now moves to reconsider this decision and for leave to file an amended complaint that asserts new factual allegations. With respect to the latter request, Trinity seeks to add an allegation that other religious organizations have been awarded tire scrap grants in the past. Trinity's proposed amended complaint asserts claims under the Equal Protection Clause of the Fourteenth Amendment, the Free Exercise, Establishment and Free Speech Clauses of the First Amendment, and Article I, Section 7 of the Missouri Constitution.

II. Discussion

A. Motion to Reconsider

Reconsideration is warranted only to correct "manifest errors of law or fact or . . . [to] present[ ] newly discovered evidence after a final judgment."

Bradley Timberland Res. v. Bradley Lumber Co., 712 F.3d 401, 407 (8th Cir. 2013) (quotation omitted). In this case, Trinity argues that reconsideration is appropriate because the Court committed a manifest error of law by reaching the legal merits of Trinity's claims. [Doc. # 36 at 2]. In particular, Trinity argues that it was improper for the Court to reject, on a motion to dismiss, its "*quid pro quo* theory of aid" as well as its "argument that the state's funding of St. Louis University, a Catholic Jesuit University, undercut the state's alleged compelling interest." [Doc. # 36-1 at 4]. In addition, Trinity argues that the Court erred by evaluating the sufficiency of the evidence and thereby exceeded the appropriate standard of review on a motion to dismiss for failure to state a claim.

Trinity's arguments are unpersuasive, however, because the dismissal was based entirely on the deficiencies in the legal theories on which Trinity relied. A key purpose of a motion to dismiss for failure to state a claim is to "eliminate those actions 'which are fatally flawed in their legal premises and designed to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity.'" *Wilson v. Duckett Truck Ctr.*, No. 1:12-CV-85 SNLJ, 2013 WL 384717, at *1 (E.D. Mo. Jan. 31, 2013) (quoting *Young v. City of St. Charles, Mo.*, 244 F.3d 623, 627 (8th Cir. 2001). In other words, where a claim depends upon a legal theory that is not cognizable, and therefore cannot entitle the plaintiff to relief, it is subject to dismissal. *See, e.g., Christopher & Banks Corp. v. Dillard's, Inc.*, 805 F. Supp. 2d 693, 695 (S.D. Iowa 2011) ("[A] complaint may be

dismissed as a matter of law if it lacks a cognizable legal theory . . . ." (quotation omitted)); *Harvey v. CitiMortgage, Inc.*, No. 4:10CV551 TIA, 2011 WL 1226973, at *3 (E.D. Mo. Mar. 29, 2011) ("[T]he undersigned finds that the vapor theory is not a valid legal basis to recovery, and dismisses the claims based upon such theory."); *Allen v. Jussila*, No. 08CV6366 (JNE/JSM), 2010 WL 759870, at *2 (D. Minn. Mar. 2, 2010) ("To state an actionable claim for relief, a complaint must allege a set of historical facts, which, if proven true, would entitle the plaintiff to some legal redress against the named defendants under some established legal theory.").

In this case, the Court found that Trinity's *quid pro quo* theory for defining "aid," as that term is used in Article I, Section 7 of the Missouri Constitution, was premised entirely on a misrepresentation of the Missouri Supreme Court's decision in *Americans United v. Rogers*, 538 S.W.2d 711 (Mo. 1976) (en banc). [Doc. # 34 at 6]. Yet, this was the only authority cited by Trinity in support of its position and the Court's own research revealed no decision, state or federal, that recognized or adopted Trinity's proposal. Based on this complete lack of authority, the inherent problems in Trinity's anomalous proposal for defining aid, and the Missouri Supreme Court's historically strict interpretation of Section 7, the Court declined to accept Trinity's unprecedented premise. [Doc. # 34 at 6-13]. Accordingly, to the extent that Trinity's claim under Section 7 rested on its *quid pro quo* theory, this claim was properly dismissed due to Trinity's failure to provide any legal support for its position

and the weight of authority to the contrary. Furthermore, absent the adoption of Trinity's definition of aid, Trinity's claim under Section 7 failed as a matter of law because it was contrary to fundamental principles of constitutional interpretation. [Doc. # 34 at 12-13].

In addition, the Court did not, as Trinity suggests, make a factual finding that Missouri had a compelling interest in excluding Trinity from the scrap tire program. Rather, the Court concluded that Trinity had failed to identify any cognizable legal theory that would require Missouri to make such a showing in order to justify its decision to exclude a religious preschool and daycare from the tire scrap grant program. Specifically, the Court held that, under *Locke v. Davey*, 540 U.S. 712 (2004), and in light of the overwhelming consensus among the lower courts that have addressed the issue, Trinity's claim that this exclusion violated the Free Exercise Clause failed as a matter of law. [Doc. # 34 at 15-29]. In turn, this undermined Trinity's Equal Protection claim because, under *Locke*, absent a Free Exercise violation, only rational-basis review applied to this claim. [Doc. # 34 at 30]; *see also Locke*, 540 U.S. at 720 n.3. Accepting as true all of the allegations in Trinity's Complaint, it was clear that the decision to deny Trinity's grant application withstood this standard of review. *See* [Doc. # 34 at 30-31]. The Court then concluded that Trinity had not identified any valid legal theory that might entitle it to relief under either the Establishment or Free Speech Clauses of the First Amendment. [Doc. # 34 at 31-34]. In sum, contrary to Trinity's claim, the Court

did not find that Trinity would not succeed on the merits. Rather, the Court concluded that Trinity could not succeed on the merits, regardless of what evidence might be adduced through discovery, because its legal theories either did not exist or were contrary to established law.

Trinity's continued reliance on *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *St. Louis Univ. v. Masonic Temple Ass'n of St. Louis*, 220 S.W.3d 721 (Mo. 2007) does not justify reconsideration. With respect to the former, the Court found that *Church of the Lukumi* was wholly inapplicable to the facts of this case, for the same reasons articulated by the Supreme Court in *Locke*. *See* [Doc. # 34 at 14-15, 17]; *see also Locke*, 540 U.S. at 720. Regarding *St. Louis University*, the Court discussed at length the numerous factual circumstances that rendered that case distinguishable from the present one. *See* [Doc. # 34 at 9-12]. This did not, as Trinity contends, amount to an evaluation of the evidence, but rather a legal conclusion regarding the relevance of this opinion to the allegations in Trinity's Complaint. The Court further found that Trinity had misrepresented the holding in *St. Louis University*, [Doc. # 34 at 9], and ultimately concluded that this case did not support Trinity's position, [Doc. # 34 at 10-11]. Yet, Trinity continues to read between the lines of that opinion in an effort to craft a rule the Missouri Supreme Court simply did not adopt. Trinity merely rehashes arguments already raised and for the reasons set forth in the prior order, there is nothing in *St. Louis*

University that suggests additional discovery is necessary in this case.

Finally, Trinity takes out of context the Court's statement that "Trinity has failed to identify any evidence that might support its claim." [Doc. # 34 at 13]. The issue here was not whether Trinity had actually presented evidence to support its claims, but rather the fact that Trinity had failed to identify any evidence that, even in theory, might be revealed through discovery and would give rise to an actionable claim. At oral argument, Trinity could not identify what sort of evidence it hoped to discover and, more importantly, was unable to connect this evidence to any established legal theory that would entitle it to relief.

B. Leave to File an Amended Complaint

Trinity also seeks leave to file an amended complaint to add the additional factual allegation that Missouri has previously awarded tire scrap grants to religious organizations. Trinity does not, however, provide any explanation as to why it waited until after the Court dismissed this action to present this new allegation. In fact, Trinity states that Missouri "disclosed during discovery" that this had occurred, [Doc. # 36 at 3], which suggests that Trinity knew of this information before the case was dismissed, but nonetheless waited until after the adverse decision to attempt to add this claim. After a final judgment has been entered, "interests of finality dictate that leave to amend should be less freely available." *U.S. ex rel. Roop v. Hypoguard*

USA, Inc., 559 F.3d 818, 823 (8th Cir. 2009). Consequently, leave to amend may be denied where the plaintiff fails "to provide any valid reason for failing to amend" prior to the adverse judgment. *Id.* at 823-24 (quoting *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 550-51 (8th Cir. 1997)). Accordingly, Trinity's failure to provide any explanation for not amending its Complaint prior to the dismissal of this action counsels against permitting the post-dismissal amendment.

Furthermore, the proposed amendment is futile. "Futility is a valid basis for denying leave to amend." *Id.* at 822. Trinity argues that this new allegation is necessary because it undermines Missouri's purported compelling interest in denying Trinity's grant application. As discussed above and in greater detail in the prior order, however, Trinity has failed to identify any valid legal theory under which Missouri would need to show the existence of a compelling interest in order to justify the decision not to award a grant to Trinity. Accordingly, even with this additional allegation, Trinity's Complaint would be subject to dismissal for failing to state a claim.

III. Conclusion

For the foregoing reasons, Trinity's motion to reconsider and for leave to file an amended complaint, [Doc. # 36], is DENIED.

NANETTE K. LAUGHREY
United States District Judge

Dated:_____
Jefferson City, Missouri

U.S. Constitution Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Missouri Constitution Article 1 § 7

Public aid for religious purposes – preferences and discriminations on religious grounds

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

Missouri Statute 260.273.
Fee, sale of new tires, amount
– collection, use of moneys – termination

1. Any person purchasing a new tire may present to the seller the used tire or remains of such used tire for which the new tire purchased is to replace.

2. A fee for each new tire sold at retail shall be imposed on any person engaging in the business of making retail sales of new tires within this state. The fee shall be charged by the retailer to the person who purchases a tire for use and not for resale. Such fee shall be imposed at the rate of fifty cents for each new tire sold. Such fee shall be added to the total cost to the purchaser at retail after all applicable sales taxes on the tires have been computed. The fee imposed, less six percent of fees collected, which shall be retained by the tire retailer as collection costs, shall be paid to the department of revenue in the form and manner required by the department of revenue and shall include the total number of new tires sold during the preceding month. The department of revenue shall promulgate rules and regulations necessary to administer the fee collection and enforcement. The terms "sold at retail" and "retail sales" do not include the sale of new tires to a person solely for the purpose of resale, if the subsequent retail sale in this state is to the ultimate consumer and is subject to the fee.

3. The department of revenue shall administer, collect and enforce the fee authorized pursuant to this section pursuant to the same procedures used in

the administration, collection and enforcement of the general state sales and use tax imposed pursuant to chapter 144 except as provided in this section. The proceeds of the new tire fee, less four percent of the proceeds, which shall be retained by the department of revenue as collection costs, shall be transferred by the department of revenue into an appropriate subaccount of the solid waste management fund, created pursuant to section 260.330.

4. Up to five percent of the revenue available may be allocated, upon appropriation, to the department of natural resources to be used cooperatively with the department of elementary and secondary education for the purposes of developing environmental educational materials, programs, and curriculum that assist in the department's implementation of sections 260.200 to 260.345.

5. Up to fifty percent of the moneys received pursuant to this section may, upon appropriation, be used to administer the programs imposed by this section. Up to forty-five percent of the moneys received under this section may, upon appropriation, be used for the grants authorized in subdivision (2) of subsection 6 of this section. All remaining moneys shall be allocated, upon appropriation, for the projects authorized in section 260.276, except that any unencumbered moneys may be used for public health, environmental, and safety projects in response to environmental or public health emergencies and threats as determined by the director.

6. The department shall promulgate, by rule, a statewide plan for the use of moneys received pursuant to this section to accomplish the following:

(1) Removal of scrap tires from illegal tire dumps;

(2) Providing grants to persons that will use products derived from scrap tires, or use scrap tires as a fuel or fuel supplement; and

(3) Resource recovery activities conducted by the department pursuant to section 260.276.

7. The fee imposed in subsection 2 of this section shall begin the first day of the month which falls at least thirty days but no more than sixty days immediately following August 28, 2005, and shall terminate January, 2020.

Rules of Missouri

Department of Natural Resources

Division 80 – Solid Waste Management

Chapter 9 – Solid Waste Management Fund

10 CSR 80-9.030 Scrap Tire Grants

PURPOSE: This rule provides a statewide plan for the use of moneys received under section 260.273, RSMo.

(1) Statewide Plan.

(A) General. In combination with 10 CSR 80-9.035 Scrap Tire Cleanup Contracts, this is a statewide plan to implement section 260.273, RSMo.

(B) Goals. The goals of the statewide plan are to reduce the number of scrap tires produced and encourage sustainable scrap tire markets for reuse, remanufacturing and reprocessing of scrap tires; divert the stream of scrap tires from being landfilled or illegally dumped; and mitigate the adverse public health, welfare and environmental impacts of illegal scrap tire sites.

(2) Grant Types. The department may provide grants not to exceed five percent (5%) of the moneys received under section 260.273, RSMo, for the following grant types subject to financial resources, appropriations, eligibility requirements and application priorities:

(A) Demonstration grants may be available to pay testing costs required to demonstrate the technical and economic feasibility of utilizing scrap tire materials in the manufacture of a product or as tire-derived fuel or a fuel supplement. Grants may also be available for end use as shock absorbing scrap tire play- ground or running track material;

1. Grant amount. The department will award grants in an amount determined by the department on an annual basis.

2. Matching share. The grantee's matching share of the total cost of the activity shall be at least fifty percent (50%) of the grant award and shall be a cash contribution toward the project. A match may be required up to fifty percent (50%) for grants utilizing shock absorbing scrap tire playground or running track material; and

(B) Capital expenditure grants may be available for equipment to convert/modify existing facilities for the purpose of using scrap tires as a fuel or fuel supplement; or for equipment to convert or modify existing facilities to manufacture products made from scrap tires.

1. Grant amount. The department will award grants in an amount determined by the department on an annual basis.

2. Matching share. The grantee's matching share of the total cost of the activity shall be up to

fifty percent (50%) of the grant award and shall be a cash contribution toward the project.

(3) Eligibility.

(A) This rule applies to any person located in Missouri involved in any activity funded under section (2) of this rule.

(B) Applications for activities that, in the department's professional judgment, would cause a public nuisance or environmental, safety or health hazards, will be disqualified.

(C) Grants will only be awarded for an activity which uses at least forty percent (40%) of its tires from Missouri scrap tire sites, retailers processors or residents. The burden of proof shall be on the applicant to show that the eligibility requirements have been met.

(D) Grants will not be awarded to activities for projects that result in the landfilling of scrap tires.

(4) Application Requirements for Grants.

(A) An applicant shall submit a completed application on forms provided by the department. The application must include all required documentation to be complete.

(B) Applications must be received by the deadline established by the department to be eligible for funding.

(C) Applicants shall prove to the department's satisfaction that the use being pro- posed is an eligible use as described in sections (3) and (4) of this rule.

(5) Application Review and Evaluation. Applications will be reviewed for completeness and ranked according to the evaluation criteria established by the department with the advice of the Scrap Tire Advisory Group and in light of the goals as set forth in subsection (1)(B) of this rule.

(6) Grant Awards.

(A) Prior to award of funding, the recipient shall:

1. Provide verification to the department that all applicable federal, state and local permits, approvals, licenses or waivers required by law to implement the activity have been obtained or applied for; and

2. Enter into a grant award agreement issued by the department.

(B) Funds awarded by the department must be disbursed in accordance with the department's general terms and conditions, special terms and conditions (if applicable), grant award and contracts.

(7) Costs and Record Keeping.

(A) Eligible costs for demonstration grants are:

1. Air emissions test costs;

2. Salaries and fringe benefit costs of personnel directly engaged in the activity;

3. Drafting, printing and distributing of final reports;

4. Supplies needed and used during the project;

5. Eligibility costs for utilization of playground or running track material are limited to the material itself and any associated delivery costs; and

6. Consultant costs.

(B) Eligible costs for capital expenditure grants are the cost of equipment, cost to convert equipment or modify existing facilities for the purpose of using scrap tires as a fuel supplement or the cost of equipment to convert or modify existing facilities to manufacture products made from scrap tires.

(C) Ineligible Costs. Demonstration and capital expenditure grants shall not include the following costs:

1. Costs for which payment has been or will be received under another federal, state or local financial assistance program;

2. Project costs incurred prior to or after the grant period;

3. Fines and penalties due to violations or failure to comply with federal, state or local laws or regulations;

4. Ordinary operating expenses of local, county and elected government, such as salaries and expenses that are not directly related to the activity;

5. Acquisition or leasing of real property; and

6. Taxes, vehicle registration, legal and contingency costs.

(D) Grant Payment.

1. Initial payment. After the grant has been approved by the department, reimbursement payments will be made on a quarterly basis, for up to seventy-five percent (75%) of the total amount of the award upon submission of complete payment requests and corresponding quarterly reports.

2. Final payment. The final twenty-five percent (25%) of the grant shall be paid to the recipient only upon approval of the final report and the final accounting of the activity's expenditures. The recipient shall submit the final payment request within sixty (60) days after project completion or at the end of the grant period. The department cannot guarantee funding of an approved activity after the close of the fiscal year in which the activity was approved.

(E) Grant Interim and Final Reports. The reporting requirements shall be provided in the department's approved written grant agreement.

(F) Accountability

1. The recipient shall maintain an accounting system that accurately reflects all fiscal transactions, incorporates appropriate controls and safeguards, and provides a clear reference, particularly to source or original documents.

2. Financial schedules and statements filed with grant applications and payment requests shall be based on records which meet the following minimum requirements:

A. Grant accounts shall separate receipts and eligible expenditures from those allocable to other programs and activities;

B. Receipts and expenditures shall be listed in sufficient detail to provide a basis for accurate and complete program reporting;

C. All activity receipts shall be identified in sufficient detail to reflect their source and purpose;

D. Supporting records for all activity expenditures shall be itemized in detail to indicate the nature and appropriateness of each. As proof of payment, cancelled checks or receipts from vendors shall be maintained;

E. All contractual services shall be verified by a formal written contract or agreement specifying financial terms, contract duration and services to be rendered;

F. The recipient shall retain all records relating to the grant activity and make them available to the department for inspection from the date of submission until three (3) years after the grant period ends;

G. If any litigation, claim, negotiation, audit or other action involving the records relating to the grant activity has been started before the expiration of the three (3)-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the initial three (3)-year period, whichever is later;

H. All general and special terms and conditions of the department applicable to the activity will be applicable to recipients of awards made available by this chapter; and

I. Persons eligible to receive grants through this rule shall comply with the department's reporting requirements, grant award agreements and contracts, general and special terms and conditions, as well as any applicable federal, state and local permits, approvals, licenses or waivers necessary to implement the activity.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.	)	
Plaintiff,	)	
v.	)	Case No. _____
SARA PARKER PAULEY, in her Official capacity as Director of The Missouri Department of Natural Resources Solid Waste Management Program,	)	
Defendant.	)	

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES NOW the plaintiff, by counsel and pursuant to the Federal Rules of Civil Procedure, and for its causes of action against Defendant, alleges and states the following:

I. INTRODUCTION

1. Plaintiff brings this action pursuant to 42 U.S.C. § 1983 for violation of its civil rights. TRINITY LUTHERAN CHURCH OF COLUMBIA, INC., ("Church") runs a learning center called the Trinity Lutheran Church Child Learning Center ("Learning Center"). Through the Learning Center, the Church sought a grant from the Missouri Department of Natural Resources Solid Waste Management Program ("Department") to participate in the 2012 Playground Scrap Tire Surface Material Grant Program ("Scrap Tire Program"). Although the Learning Center's application scored fifth out of forty-four applications, it was denied participation in the Scrap Tire Program solely because the Learning Center is a part of a church. Prohibiting the Learning Center from participating in the Scrap Tire Program because it is a part of a church violates Plaintiff s rights to equal protection, free exercise of religion and free speech under the First and Fourteenth Amendments to the United States Constitution, the First Amendment's Establishment Clause and the Missouri Constitution Article 1, § 7.

2. The Church desires to participate in the Scrap Tire Program in the future without discrimination. It seeks declaratory and injunctive relief to redress irreparable harm to its civil rights.

II.
JURISDICTION AND VENUE

3. This action raises federal questions under the United States Constitution, particularly the First

and Fourteenth Amendments, and questions of state law under the Missouri Constitution Article 1, § 7.

4. This Court has original jurisdiction over the federal claims by operation of 28 U.S.C. §§ 1331 and 1343 and has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 to hear claims under the State Constitution.

5. This Court has authority to grant the requested injunctive relief under 28 U.S.C. §1343(3); declaratory relief under 28 U.S.C. §2201(a) and attorneys' fees under 42 U.S.C. §1988(b).

6. Venue is proper in this Court under 28 U.S.C. § 1391(b), as a substantial part of the events or omissions giving rise to the claims occurred in this District.

III.
IDENTIFICATION OF PLAINTIFF

7. Plaintiff TRINITY LUTHERAN CHURCH OF COLUMBIA, INC. is a non-profit corporation that runs the Learning Center. The Learning Center was incorporated in 1980 as a non-profit charitable corporation in Missouri, and then merged with Trinity Lutheran Church in 1985.

IV.
IDENTIFICATION OF DEFENDANT

8. Defendant SARA PARKER PAULEY is the Director of the Missouri Department of Natural

Resources Solid Waste Management Program, and is sued only in her official capacity. The Director oversees the Scrap Tire Program and has authority to implement the requested injunctive relief sought in this matter. *See* V.A.M.S. Const. Art. 4, § 47.

V.
STATEMENT OF FACTS

9. The Church, through the Learning Center, runs a pre-school at 2201 West Rollins Road, in Columbia, Missouri.

10. The Learning Center was established as a not-for-profit organization in 1980 with the mission of providing quality pre-school education and day care for families in the Boone County, Missouri and surrounding areas.

11. In 1985, the Learning Center merged with Trinity Lutheran Church, and remains in this status.

12. The Learning Center is licensed by the Missouri Department of Health and Senior Services, Bureau of Child Care Safety and Licensing and is in the process of gaining accreditation as an early childhood education program.

13. Enrollment at the Learning Center averages 90 children ages two to kindergarten. The Learning Center is open year round and services working families and parents attending school throughout

the City of Columbia, Boone County, and other adjacent counties.

14. The Learning Center is a ministry of the Church and incorporates daily religion and developmentally appropriate activities into a school and optional daycare program.

15. Through the Learning Center, the Church teaches a Christian world view to children of members of the Church, as well as children of non-member residents of Boone County and the surrounding area.

16. The Learning Center provides a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively.

17. The Church has a sincere religious belief to be associated with the Learning Center and to use it to teach the Gospel to children of its members, as well to bring the Gospel message to non-members.

18. The enrollment policy of the Learning Center is to provide equal opportunity for students. The Learning Center admits students of any sex, race, color, religion, national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the Learning Center.

19. The Learning Center provides a playground for its students. But the surface of the playground consisted of pea gravel and grass.

20. The Learning Center sought to improve the safety of the surface area of the playground by participating in the Scrap Tire Program.

21. The Scrap Tire Program, run by the Department, provides grants to qualifying organizations to use recycled tires for playgrounds.

22. This program not only allows grant recipients to provide safe surfacing for playgrounds, but encourages the use of re-cycled tires, thus reducing the landfills and benefiting the environment.

23. Nonprofit day care centers and other nonprofit entities are eligible to submit grant applications.

24. The Church, through the Learning Center, sought to participate in the 2012 Scrap Tire Program to remove and replace the large portion of the pea gravel surfacing on its playgrounds with a recycled pour-in-place rubberized product.

25. But the Department has a policy that prohibits organizations from participating in the Scrap Tire Program if the applicant is owned or controlled by a church, sect, or denomination of religions, if the grant would directly aid any church, sect or denomination of religion, if the applicant's

mission is not secular in nature, or if the grant would not be used for secular purposes. *See* Scrap Tire Program grant application, attached to the complaint as Exhibit A.

26. Phil Glenn, a representative of the Church, contacted Kim Tschirgi, a planner for the Department, concerning this prohibition. Ms. Tschirgi informed Mr. Glenn that the Department did not refuse applications from any organizations.

27. Ms. Tschirgi clarified that if the organization scored high enough on the application to otherwise qualify for a grant, the application might have to be forwarded to the Department's legal office for review to determine eligibility.

28. The Church, through the Learning Center, then applied for a grant from the Department through its 2012 Scrap Tire Program. The grant is attached to the Complaint as Exhibit B.

29. The grant applications for the 2012 Scrap Tire Program were graded by the Department.

30. The applications are graded because there is a limited amount of money to disburse through the grant. By grading the applications, the Department ensures that the organizations that will best serve the purposes of the grant will receive the grant.

31. The Church's grant application received 640 total points, and ranked fifth out of 44 applications.

32. According to the Department, fourteen grant projects were funded in 2012. *See* Exhibit C, attached to the complaint (May 23, 2012 email from Kim Tschirgi, Planner for the Solid Waste management Program to Mr. Glenn). The Department denied the Church's grant.

33. In a letter from Chris Nagel, the Director of the Solid Waste Management Program, dated May 21, 2012, the Department stated,

> Thank you for the time and effort you have taken to respond to the Missouri Department of Natural Resource's recent offering of financial assistance through the 2012 Playground Scrap Tire Surface Material Grants. The department appreciates your candor in explaining how the former "Trinity Lutheran Child Learning Center" was merged into the surviving corporation "Trinity Lutheran Church of Columbia, Missouri, Inc." back in the 1980s. However, after further review of applicable constitutional limitations, the department is unable to provide this financial assistance directly to the church as contemplated by the grant application. Please note that Article I, Section 7 of the Missouri Constitution specifically provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion..."

See Exhibit D attached to the complaint (May 21, 2012 letter from Chris Nagel to Gail Schuster, Director of the Trinity Lutheran Church Child Learning Center).

34. Article 1, Section 7 of the Missouri Constitution states,

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

See V.A.M.S. Const. Art. 1, § 7 ("Missouri's Blaine Amendment").

35. The sole reason the Church's grant was denied was because it was a church.

36. The Church desires to participate in future grants from the Missouri Department of Natural Resources, including future Scrap Tire Programs.

37. The Learning Center has additional playgrounds on its facilities that are in need of safer surfacing.

38. Through the Learning Center, the Church desires to apply for future grants from the Scrap

Tire Programs to be able to acquire re-cycled tires to resurface its playgrounds.

39. Due to the Department's actions and policies described above, including its unconstitutional application of the Missouri Blaine Amendment in denying the Plaintiff's grant application, the Learning Center cannot receive future grants.

VI.
STATEMENT OF LAW

40. Each and all of the acts herein alleged of the Department, its officers, agents, servants, employees, or persons acting at its behest or direction, were done and are continuing to be done under the color of state law, including the statutes, regulations, customs, policies, and usages of the State of Missouri.

41. Defendant prohibited Plaintiff from receiving a grant because the Learning Center is connected to a church, pursuant to the Department's customs, policies and practices, including its unconstitutional application of Missouri's Blaine Amendment.

42. Defendant's decision to deny Plaintiff access to the Scrap Tire Program is a direct result of the policies, practices, customs, and usages officially adopted and promulgated by Department.

43. As a direct result of the Defendant's violation of Plaintiff's constitutional rights, as

alleged below, Plaintiff is unable to participate in a government program without violating its religious beliefs and practices, resulting in irreparable harm for which there is no adequate remedy at law.

44. Defendant is treating Plaintiff differently than other grant applicants because it is a church.

45. Plaintiff's religious exercise is fully protected by the United States Constitution.

46. Plaintiff's right to be treated similarly to non-religious grant applicants is fully protected by the United States Constitution.

47. Prohibiting Plaintiff from participating in the Scrap Tire Program because it is a church is a violation of the First Amendment and Fourteenth Amendment to the United States Constitution.

48. Unless and until the Defendant's exclusion of the Plaintiff from the Scrap Tire Program is enjoined, the Plaintiff will suffer and continue to suffer irreparable harm to its constitutional rights.

49. Providing grant monies to Plaintiff for the purpose of purchasing recycled tires for a playground does not impermissibly aid any church, sect or denomination of religion in violation of Missouri's Blaine Amendment.

50. Prohibiting Plaintiff from participating in the Tire Scrap Program because it is a church

violates the Blaine Amendment as it discriminates against the Plaintiff because it is a church.

VII.
FIRST CAUSE OF ACTION: VIOLATION OF THE RIGHT TO EQUAL PROTECTION UNDER THE UNITED STATES CONSTITUTION

51. The allegations contained in paragraphs 1-50 are incorporated herein by reference.

52. Defendant has allowed other similarly-situated non-profit organizations to participate in the Scrap Tire Program, including other learning centers and day care organizations such as Jefferson City Day Care Center, Inc.

53. The Equal Protection Clause requires that the government treat equally all persons similarly situated.

54. Defendant denied Plaintiff access to the Scrap Tire Program solely because the Learning Center is connected with a church.

55. Religion is a suspect class.

56. In order for the Department to treat Plaintiff dissimilarly with other like organizations, it must have a compelling reason and such treatment must be the least restrictive means of achieving that interest.

57. Defendant does not have a compelling governmental interest to justify such disparate treatment of Plaintiff.

58. Excluding Plaintiff from the Scrap Tire Program is not narrowly tailored to achieve a compelling governmental interest.

59. Excluding Plaintiff from the Scrap Tire Program because the Learning Center is connected to a church is not rationally related to a legitimate governmental interest.

60. Defendant's actions in unconstitutionally enforcing the Missouri Blaine Amendment by denying Plaintiff's grant application targets religion for disparate treatment as compared to secular applicants.

61. Defendant's actions and policies violate the Equal Protection Clause of the Fourteenth Amendment.

WHEREFORE, Plaintiff respectfully prays that the Court grant the relief set forth in the prayer for relief.

VIII.
SECOND CAUSE OF ACTION: VIOLATION OF THE RIGHT TO FREE EXERCISE OF RELIGION UNDER THE UNITED STATES CONSTITUTION

62. The allegations contained in paragraphs 1-50 are incorporated herein by reference.

63. The Church has a sincere religious belief to teach a Christian worldview to children through the Learning Center.

64. The Department's policies and actions require the Church to abandon its religious beliefs and practices in order to participate in the Scrap Tire Program.

65. Requiring the Church to choose between participating in a government program or forfeiting its religious beliefs and practices is a violation of the Free Exercise Clause of the United States Constitution.

66. Requiring the Church to choose between participating in a government program or forfeiting its religious beliefs and practices places a substantial burden on Plaintiff's religious exercise.

67. Defendant's actions in unconstitutionally enforcing the Missouri Blaine Amendment by denying Plaintiff's grant application because it is a church targets religious exercise.

68. The Department's policies and actions as described above are not neutral, nor generally applicable.

69. The Department's policies and actions as described above target religion for disparate treatment.

70. The Department's policies and actions do not serve a compelling governmental interest and are not narrowly tailored to achieve a valid governmental interest.

WHEREFORE, Plaintiff respectfully prays that the Court grant the relief set forth in the prayer for relief.

IX.
THIRD CAUSE OF ACTION: VIOLATION OF THE ESTABLISHMENT CLAUSE UNDER THE UNITED STATES CONSTITUTION

71. The allegations contained in paragraphs 1-50 are incorporated herein by reference.

72. The Department's policies and actions that prohibit organizations from participating in the Scrap Tire Program that are "owned or controlled by a church, sect, or denomination of religions" and where such grant would "directly aid any church, sect or denomination of religion" are hostile to religion.

73. The Defendant's actions in enforcing the Department's policies, including its unconstitutional application of the Missouri Blaine Amendment, to

deny Plaintiff's grant application was hostile to religion.

74. The Defendant's actions in enforcing the Department's policies, including its unconstitutional application of the Missouri Blaine Amendment, to deny Plaintiff's grant application did not serve a valid secular purpose.

75. The Defendant's actions in enforcing the Department's policies, including its unconstitutional application of the Missouri Blaine Amendment, to deny Plaintiff's grant application has the primary effect of hostility to religion.

76. The Defendant's actions in enforcing the Department's policies, including its unconstitutional application of the Missouri Blaine Amendment, to deny Plaintiff's grant application excessively entangles the Department with religion as it has to determine what is religious enough to justify denial of a grant.

77. The Department's policies and actions in enforcing the Department's policies, including its unconstitutional application of the Missouri Blaine Amendment, to deny Plaintiff's grant application target religion for disparate treatment.

78. The Department's policies and actions, and the Defendant's enforcement of those policies, violate the Establishment Clause of the United States Constitution.

WHEREFORE, Plaintiff respectfully prays that the Court grant the relief set forth in the prayer for relief.

FOURTH CAUSE OF ACTION: VIOLATION OF THE FREE SPECCH CLAUSE UNDER THE UNITED STATES CONSTITUTION

79. The allegations contained in paragraphs 1-50 are incorporated herein by reference.

80. The Church engages in speech and expressive activity by teaching a Christian worldview to children through the Learning Center.

81. The Church's speech is fully protected by the First Amendment to the United States Constitution.

82. The Department's policies and actions in prohibiting Plaintiff from participating in the Scrap Tire Program because it is a church restricts Plaintiff's speech based on its religious viewpoint and content.

83. The Department's policies and actions in prohibiting Plaintiff from participating in the Scrap Tire Program because it is a church singles out religious expression for discriminatory and unfavorable treatment.

84. The Department's policies and actions in prohibiting Plaintiff from participating in the Scrap Tire Program because it is a church restrains

constitutionally-protected speech in advance of its expression.

85. The Department's policies and actions in prohibiting Plaintiff from participating in the Scrap Tire Program because it is a church chills the Plaintiff's speech.

86. The Department's policies and actions in prohibiting Plaintiff from participating in the Scrap Tire Program because it is a church grants unfettered discretion to the Department officials in applying Missouri's Blaine Amendment. For example, Department officials have unfettered discretion to determine what type of grant to a church impermissibly aids the church.

87. The Department's policies and actions in prohibiting Plaintiff from participating in the Scrap Tire Program because it is a church burdens religious expression like that of Plaintiff's.

88. The Department has no compelling reason that would justify their restrictions on speech.

89. The Department has no rational basis that would justify their restrictions on speech.

90. The Department's policies and actions are not narrowly tailored to achieve any permissible governmental interest.

WHEREFORE, Plaintiff respectfully prays that the Court grant the relief set forth in the prayer for relief.

FIFTH CAUSE OF ACTION:
VIOLATION OF THE MISSOURI BLAINE AMENDMENT, V.A.M.S., ART. 1, §7.

91. The allegations contained in paragraphs 1-50 are incorporated herein by reference.

92. Missouri's Blaine Amendment states that "no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." *See* V.A.M.S. Art. 1, § 7.

93. The Department's policies and actions in prohibiting Plaintiff from participating in the Scrap Tire Program because it is a church discriminates against Plaintiff because it is a church, in violation of Missouri's Blaine Amendment.

94. Providing grant monies to Plaintiff for the purpose of purchasing recycled tires for a playground does not impermissibly aid any church, sect or denomination of religion.

95. Prohibiting Plaintiff from participating in the Tire Scrap Program because it is a church violates the Blaine Amendment as it discriminates against the Plaintiff because it is a church.

WHEREFORE, Plaintiff respectfully prays that the Court grant the relief set forth in the prayer for relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Honorable Court:

A. Enter a Declaratory Judgment stating that the Department's failure to approve the Church's 2012 Scrap Tire Application and its policies and actions in denying grants to applicants who are churches or connected to churches violate the Equal Protection, Free Exercise, Free Speech, and Establishment Clauses of the First and Fourteenth Amendments to the United States Constitution, as well as the Missouri Constitution, Article 1, § 7;

B. Enter a preliminary and permanent injunction enjoining the Defendant, her agents, servants, employees, officials or any other person acting in concert with her or on her behalf, from discriminating against the Church on future grant applications based upon the connection between the Church and the Learning Center, including applying the Blaine Amendment against the Church to deny it a grant for recycled tires because it is a church;

C. Declare that the Missouri Blaine Amendment was unconstitutional as applied to deny Plaintiff's 2012 grant application;

D. Award Plaintiff's costs and expenses of this Action, including a reasonable attorneys' fee award, in accordance with 42 U.S.C. § 1988, and other applicable state and federal law;

E. Grant such other and further relief as the Court deems equitable, just, and proper;

F. Adjudge, decree, and declare the rights and other legal relations of the parties to the subject matter here in controversy, in order that such declarations shall have the force and effect of final judgment; and

G. Retain jurisdiction of this matter for the purpose of enforcing the Court's orders.

Respectfully submitted this 25th day of January, 2013.

/s/ Joel L. Oster
Joel L. Oster
Missouri Bar # 50513
joster@alliancedefendingfreedom.org
Erik W. Stanley*
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1100 Main Street, Suite 2600
Kansas City, Missouri 64105
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(916) 221-8763 fax
mike@thewhiteheadfirm.org

ATTORNEYS FOR PLAINTIFF

**Pro hac vice to be submitted*

VERIFICATION OF COMPLAINT

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that I have read the foregoing Verified Complaint and the factual allegations thereof and that to the best of my knowledge the facts alleged therein are true and correct.

Executed this 24th day of January, 2013.

/s/ Mike Walz

Mike Walz, President

/s/ Deborah K. Antel

Deborah K. Antel, Secretary

PLAYGROUND SCRAP TIRE SURFACE MATERIAL GRANT APPLICATION FORM[1]

Missouri Department of Natural Resources
Solid Waste Management Program

Legal Name of Organization: Trinity Lutheran Church Child Learning Center
Address: 2201 West Rollins Road; Columbia, MO 65203
Telephone Number: 573-445-1014
Fax Number: 573-445-5878
Federal Tax ID Number: 23-7426726

APPLICANT PROFILE

Type of Applicant: (indicated) Non-Profit entity (attach legal status documentation)
Name of Authorized Official: Ms. Gail Schuster
Official Title: Director
Mailing Address: 2201 West Rollins Road; Columbia, MO 65203
Telephone Number: 573-445-1014
Fax Number: 573-445-58780
Email Address: glennhaven@ktis.net

LOCATION PROFILE - *Location of the project site and status of property (i.e. owned, leased, being*

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[1] The Appendix contains the substance of the application submitted by the Petitioner but the formatting has been revised to comply with this Court's font and page formatting rules. The grant application in its original formatting is part of the record below in this case.

purchased; attach proof of ownership or written permission from property owner.)

Property is located at 2201 West Rollins Road, Columbia, Missouri and is owned by Trinity Lutheran Church of Columbia, Inc. Letter granting permission for this project and clarifying ownership is at Attachment A to this application.

Solid Waste Management Region: Region H - Mid-Missouri Solid Waste Management District

County: Boone

PROJECT DESCRIPTION - *Describe the proposed project and its objectives. Explain why there is a need for the project and its current status. Describe the number of people served by the project and the approximate geographic area of Missouri that will benefit from the project.*

See Attachment B

MATERIAL SUMMARY - *Provide written documentation (scrap tire material vendor quotes) regarding the quality, quantity, cost and availability of your source of scrap tire material. Documentation should include the quantity required for your project, an estimated cost for the material for your project, an estimate of the cost of delivery of the material and the percentage of Missouri generated tires used in the material.*

See Attachment C

SOLID WASTE MANAGEMENT REGION COOPERATIVE EFFORT - *Describe in detail the Solid Waste management Region's involvement in the project.*

The Mid-Missouri Solid Waste Management District's Executive Board supports the objectives of this project (see Attachment D). They believe the successful completion of this project will help promote awareness of the availability and marketability of recycled rubber tire products. In addition, the City of Columbia Solid Waste Department endorses this project (see Attachment E).

MEDIA EXPOSURE - *Provide a plan to seek media exposure for this project (guidelines provided in the application instructions).*

The child Learning Center will implement an aggressive community awareness program to publicize this project. After the completion of the project, we plan to conduct a ribbon-cutting ceremony with invitations to various community group leaders and City of Columbia leaders. This opening ceremony will publicize the benefits of using recycled materials, especially discarded used automobile tires, to improve our environment. In addition, The Center will utilize the monthly newsletter, social networking sites, website and local media press releases to inform the community of the project. The Center will contact local television and radio stations for potential news reports on the project. Local print media such as newspapers and

local magazines will be contacted with press releases and ideas for possible news stories on the project. See Attachment G, Information Plan.

RECYCLING EDUCATION – *Provide a plan to use the project as part of a recycling program to teach students or children the benefits of recycling.*

Children who attend The Learning Center are encouraged to recycle as part of the school curriculum. See Attachment F for lesson plan. This project will provide an excellent learning environment for teaching the children the advantages of recycling discarded products. The children and parents will experience firsthand how recycled rubber products can enhance safety and the environment. Through the use of the information plan, parents and members of the community will be educated on the benefits of recycling. This project will go hand-in-hand with The Center's existing policy of recycling aluminum cans, plastic, electronic equipment, office equipment, and paper products.

INFORMATION PLAN – *Provide a plan for sending grant information to others (guidelines provided in application instructions).*

See Attachment G

SCOPE OF WORK – *Identify project tasks by number and describe each task in not more than one paragraph. Project tasks are the actions taken to achieve specified project objectives. Identify which personnel are responsible for each task.*

See Attachment H

TIMELINE GRAPH – *The Scope of Work tasks must be the items on the vertical axis of the timeline graph. Quarterly progress reports are mandatory and shall be submitted after the third, sixth, ninth, and twelfth month of the project period. The project period will be stated on the Financial Assistance Agreement of the grant. Due to the variable nature of the financial assistance negotiation process, it is not possible to predict the project start date. For this reason, the months on the timeline are referred to as numbers 1-13, not as January, February, etc.*

See Attachment I

BUDGET – *Complete the budget below showing the total cost of the proposed playground scrap tire surface material project. Grant funds are eligible for surface material and delivery costs only. Site preparation, material containment/support, labor, etc. are costs not eligible for grant fund reimbursement.*

Provide a copy of scrap tire material vendor quotes supporting the budget figures included below. Fifteen scoring points are awarded if 3 or more quotes are provided.

Preference will be given to applicants requesting mats or pour-in-place surface materials. Grant recipients requesting mats or pour-in-place surface material will be eligible for a grant award up to $20,000 while

those requesting loose surface material will be eligible for a grant award up to $10,000.

Note: The budget summary will be used as the basis for the grant agreement and reflects the maximum amount for which the recipient may be eligible for reimbursement. If an applicant receives a grant award based upon additional scoring of points due to the recipient's intent to purchase additional surface material, the recipient will only be eligible to receive reimbursement based on the percentage of the actual project cost.

Budget Summary:

Requested Grant Funds:	
Scrap Tire Material.....	$20,000
Additional Surface Material Funds:	
Scrap Tire Material.....	$10,080
Delivery.....	$ 500
Total Project Cost (surface material only).....	$30,580

SUPPORTING DOCUMENTS – - Preliminary Project Design - *Provide a diagram of the area where the scrap tire surface material will be used. Include dimensions of the area and type of material to be utilized. Loose surface material must by 8" depth to ensure fall safety, wire free and properly contained. Mats and pour-in-place surface material must be*

placed on asphalt, concrete, or other suitable surface(s). Provide information on both the surface material and containment (loose fill) or support (mats, tiles, pour-in-place) material to be used. All surface material projects must conform to the manufacturer's specifications.

See attachment J

APPLICATION CHECKLIST – *Before submitting your application, please complete this checklist. Only if the applicant can answer Yes to all questions on this form should the application be submitted. Evidence substantiating each "Yes" answer in the checklist must be included in the application and be referenced on the checklist.*

1. *Is the certification statement below signed and dated by the authorized official?* Yes – Attachment A

2. *Are an original and two copies of the application submitted?* Yes

3. *Is the project located in Missouri?* Yes; Attachment A

4. *Is the applicant profile complete?* Yes; Page 1

5. *Is the location profile complete?* Yes; Page 1

6. *Is the project description complete?* Yes; Attachment B

7. *Is the material summary complete?* Yes; Attachment C

8. *Is the media exposure complete?* Yes; Page 2

9. *Is the recycling education complete?* Yes; Attachment F

10. *Is the information plan complete?* Yes; Attachment G

11. *Is the Solid Waste Management Region cooperative effort complete?* Yes; Attachment D

12. *Is the scope of work complete?* Yes; Attachment H

13. *Is the time line graph complete and in the proper format?* Yes; Attachment I

14. *Is the budget complete?* Yes; Page 4

15. *Is support documentation as required provided?* Yes; Attachment J

16. *Is the amount of assistance requested $20,000 or less for mats or pour-in-place surface material, or $10,000 or less for loose surface material?* Yes

I hereby certify that the information in this application is true and correct. I further certify that the organization that I represent has sufficient resources to conduct this project while awaiting reimbursement from the department. Further, I certify compliance with the following criteria:

1. The application is not owned or controlled by a church, sect, or denomination of religions and the grant would not directly aid any church, sect or denomination of religion.

2. The applicant's mission and activities are secular (separate from religion; not spiritual) in nature.

3. The grant will be used for secular (separate from religion; not spiritual) purposes rather than for sectarian (Denominational, devoted to a sect) purposes.

SIGNATURE OF AUTHORIZED OFFICIAL / DATE
SIGNATURE OF PROJECT MANAGER / DATE

ATTACHMENT A
LETTER OF OWNERSHIP AND APPROVAL OF PROJECT

TRINITY LUTHERAN CHURCH
<Letterhead>

Missouri Department of Natural Resources
Solid Waste Management Program
P.O. Box 176
Jefferson City, MO 65102-0176

Subject: Grant Application – Trinity Lutheran Child Learning Center

To Whom It May Concern:

In support of The Trinity Lutheran Child Learning Center (TLCLC) grant application for the Missouri Department of Natural Resources Playground Scrap Tire Surface Material Grant program, this letter provides: 1) proof of ownership of The TLCLC; and 2) owner approval to install a recycled rubber product on the church property.

The TLCLC was established as a separate corporate entity in 1980 and eventually merged with Trinity Lutheran Church of Columbia, Incorporated in 1985 (Attachment 1) and therefore TLCLC is an entity under the auspices of Trinity Lutheran Church of Columbia, Inc. and located on church property.

The TLCLC is a not-for-profit organization under the corporate church not-for-profit status (See

Attachment 2). It is a ministry to Columbia, Boone County and surrounding counties and community residents and admits students of any sex, race, color. national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the Learning Center. It does not discriminate on the basis of sex, race, color, national and ethnic origin in administration of its educational policies and other school administered programs nor does it require any statement of faith as a requirement for admission.

The Trinity Lutheran Church of Columbia, Inc. Board of Directors has reviewed the TLCLC plan for installing a recycled tire resilient rubber product on the school playground and approves the installation on church property.

Sincerely,

Mike Walz
<signature block>

2 Attachments:
A-1. Corporate merger document
A-2. Not-for-profit designation

ATTACHMENT B
PROJECT DESCRIPTION

The Trinity Lutheran Child Learning Center (TLCLC) was established as a not-for-profit organization in 1980 with the mission of providing quality pre-school education and day care for families in the Boone County and surrounding areas. In 1985, TLCLC was merged with Trinity Lutheran Church of Columbia, Inc. and remains in this status. The Center is licensed by the Missouri Department of Health and Senior Services, Bureau of Child Care Safety and Licensing and is in the process of gaining accreditation as an early childhood education program. The upgrade of the TLCLC playground is an integral part of supporting documentation for the accreditation process. TLCLC also participates in the Federal Child and Adult Care Food program. Enrollment at The Center averages 90 children ages 2 up to kindergarten. The Center is open year round and services working families and parents attending school throughout The City of Columbia, Boone County and other adjacent counties. The mission of The Center is to provide a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively.

The enrollment policy of the TLCLC is as follows: "Equal Opportunity for Students: Trinity Lutheran Child Learning Center admits students of any sex, race, color, national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at

the Learning Center. It does not discriminate on the basis of sex, race, color, national and ethnic origin in administration of its educational policies and other school administered programs."

TLCLC has one moderately sized playground that is subdivided into two areas (see Attachment 3): an area for younger children up to ages 2 ½ to 4 years (averaging approximately 25 children during play periods) and another larger area for the older children through pre-kindergarten age (averaging approximately 30-40 children during play periods). Each area also includes a large covered pavilion that houses sandbox play areas. The two areas have a number of different playground equipment systems appropriate to the age of the child. The surfacing in both areas, other than the sand box pavilions, is pea gravel with some other areas of grass which will not be replaced. The pea gravel surface continually migrates away from critical play areas, especially under the swing sets and slide units and climbing units. TLCLC has placed rubber mats in critical areas but the pea gravel continually erodes from under the mats and creates a trip hazard. The pea gravel is unforgiving if/when a child falls and thereby poses a basic safety hazard.

The TLCLC proposed project will remove and replace an older climbing/swing structure with a safer, newer technology unit and will remove and replace a large portion of the pea gravel surfacing with a recycled pour-in- place rubberized product (with the assistance of the DNR grant program). The TLCLC will contribute 30% toward the resurfacing

portion of the project and will provide self-help labor to prepare the site for the new surfacing material in accordance with the installation contractor and rubber product manufacturer requirements.

The benefits to this project are to increase access to the playground to all children, regardless of ability, by providing American with Disabilities Act (ADA)-compliant surfacing and to provide long-term, safe, resilient surfacing under the playground equipment and other play areas. A very important side benefit from this proposed project is the use of Missouri recycled automobile tires for the resilient surfacing material which is a positive use of a recycled product to improve our Missouri environment.

This proposed project will be cost effective for the long term and provide a much safer environment for not only The Center students but the surrounding community as local children frequently use the playground during non- school hours and nights and weekends. In addition, Trinity provides facilities for a kindergarten through eighth grade elementary school and children from that school often utilize the playground after hours.

ATTACHMENT C
VENDOR QUOTES

Quote 1:

From: "BertDarling"bdarling@roosterrubber.com
Date: 01/13/2012 1:04PM
To: <glennhaven@ktis.net>
Subject: Rooster Rubber Premium Rubber Mulch

Phil;

Thank you for visiting our website and your inquiry regarding Rooster Rubber's Premium Rubber Mulch and playground surfacing for your grant application.

Please let me know;
The square foot area you would like to cover; See below
Color desired; Black and 1 color
Quote;
Section 1 ; 6504 051 sq/ft @ $13.55/sq ft = $8,8130 0
Section 2; 491.519 sq/ft @ $13.55/sq f t = $6,660 00
Section 3 ; 1,6700 933 sq/ft @ $15.00/sq ft = $25,051.4 0
Plus applicable taxes.
Freight estimate; Included
Availability; In stock
Site Preparation: Not Included
Installation; Sub-surface and EPDMs surface only, cleanup
Swing/Slide Black Rubber Mats;
2' x2' x 5/8" or 2' x3' x 5/8"; $52.00/each
4'x4'x 5/8" or 4'x6'x 5/8"; $

Borders (4' long x 12" tall x 4" wide); Not included
Percentage of Missouri tires used in our products; 100% of Black EPDM (Documentation available upon request)

I look forward to hearing from you.

NEVER MULCH AGAIN!!!!

Bert Darling
Rooster Rubber, LLC
(816) 241-6400
bdarling@RoosterRubber.com

Quote 2:

S. Bollinger & Associates, LLC
Safety surfacing
P.O. Box 856
Hillsboro, MO 63050

January 17, 2012

Trinity Lutheran Church

RE: Playground Surfacing

Attention: Phil Glenn

Per your email request dated 1-12-12 we are proposing to furnish all labor and material necessary to install pour-in-place playground surfacing in your

existing playgrounds with the following qualifications.

Three areas – totaling 2,811 sq. ft.
Sub-base by others
Thickness – 2"
Color – 50% color/50% black
Total.....$30,921.00

Included is the cost for the waste tire material $5,850.00
Included is the cost for the waste tire material delivery $1,625.00
100% of the waste tire material is generated in State of Missouri

Alternate Pricing
Sub-base includes remove and dispose of existing pea gravel surfacing and install a compacted rock sub-Base minimum 4" thick

Total.....$7,027.50

We appreciate the opportunity to bid on the above project. Please contact our office if you have any questions or need additional information. We look forward to doing business with you.

Sincerely.

Steven B. Bollinger
(636) 797-5820
(636) 797-5881 (Fax)
steve.bollinger@att.net

Quote 3:

Entire Recycling January 18, 2012

13974 US Hwy 136, Rock Port, MO 64482

Phone: 1-600-744-2252; Fax: 1-600-744-2732

Email: jim@entirerecycling.com

Trinity Lutheran Church Phone: 573-592-7866

Columbia, MO Cell: 573-310-1489

Phil Glenn, Project Coordinator

TOTAL 2811 SQUARE FEET OF PLAYGROUND AREA QUOTE

2" BASE + 1/2" CAP TOP COAT: 2 ½" Pour in Place in three areas

2811 sq. ft. our in place @ $9.50 per sq. ft. = $26,704.50 total project

1670 sq. ft. area:

85 bags SBR x 55 lb. per bag = 4675 lb. x .30 =	$1,402.50
167 bags of pad buffing x 50 lb. per bag = 8350 lb x .22 =	$1,837.00
2107 lb. urethane x 2.20 =	$4,635.40

650 sq. ft. area:

31 bags SBR x 55 lb. per bag = 1705 lb. x .30 =	$511.50
65 bags of pad buffing x 50 lb. per bag = 3250 lb x .22 =	$715.00
793 lb. urethane x 2.20 =	$1,744.60

491 sq. ft. area:

25 bags SBR x 55 lb. per bag = 1375 lb. x .30 =	$412.50
49 bags of pad buffing x 50 lb. per bag = 2450 lb x .22 =	$539.00
619 lb. urethane x 2.20 =	$1,361.80

Material Cost	$13,159.30
Estimated Delivery Cost	$ 1,000.00
Labor	$12,545.20
TOTAL COST OF PROJECT	$26,704.50

Approximately 1454 PTE's will be used in this project using 100% Missouri scrap tires. Our product is of the highest quality, being 99.9% free of all foreign matter such as steel, nylon, etc.

ATTACHMENT F
RECYCLING LESSON PLAN

Trinity Lutheran Child Learning Center
Weekly Planning Form - THEME: RECYCLING

Changes in learning centers:

Blocks: add recyclable items to this area – cartons, boxes, egg cartons

Dramatic play: children donate appropriate clothes for dress up area; add recycled plastic items to play kitchen area

Toys and games: paper towel rolls for binoculars, car tunnels

Art: piggy banks from recycled water bottles; recycled pp towel roll butterfly; use paper towel rolls, other items for printing; paper mosaic (cut up bright colored old TLCLC menus)

Library: add books on environment and how to recycle to the reading book area

Writing and discovery area: use all recycled paper, remind children of this talk

Sensory table: children bring in recycled items to use in sensory table; at end of week children place items in

Music and movement: Jack Johnson's song "Reduce, Reuse, Recycle"; use small plastic M&M containers for music shakers

Cooking/measuring: use water and paper towels conservatively to save on water and paper towels; make paste from flour and water to make a Paper Mache sculpture together – children decide theme

Playground: add various recycled plastic containers to sandbox for scoops; add various sized empty cardboard boxes to playground and on Friday children flatten boxes and take to church's large recycling bin for pick-up

Outdoors: go for nature walk; talk about nature vs manmade things we see; how can we take good care of everything?

Family & community involvement: reminders sent home for families to recycle at home and school; bring in recycled items on list for our art and block areas

Daily Plans:

Monday:

GROUP TIME (songs, stories, games, discussions, etc.	discuss reduce, reuse, recycle; acquaint them with sorting recyclables in ea. category; Game: listening outside sounds
STORY TIME - book	Michael Recycle by Ellie Bethel

SMALL GROUP ACTIVITIES	emphasize letter R; what sounds does it make? Recycle, Reuse, Reduce; choose one of the art activities above
SPECIAL ACTIVITIES (site visits, special events, etc.)	fine tune

Tuesday:

GROUP TIME (songs, stories, games, discussions, etc.	our earth: leaves, rocks, soil, wind, rain/snow, sunshine, clouds; how do we take care of our earth? What can we do to recycle and reuse things at school and at home? Remind children to recycle paper in classroom
STORY TIME - book	Biscuit's Earth Dav Celebration
SMALL GROUP ACTIVITIES	practice writing letter R in air, sand, carpet, table with finger paints
SPECIAL ACTIVITIES (site visits, special events, etc.)	go for nature walk; collect items for an art collage and pick up litter (teachers handle litter for sanitary reasons)

Wednesday:

GROUP TIME (songs, stories, games,	our earth: leaves, rocks, soil, wind, rain/snow,

discussions, etc.	sunshine, clouds; how do we take care of our earth? What can we do to recycle and reuse things at school and at home? Remind children to recycle paper in classroom
STORY TIME - book	Michael Recycle & The Tree Top Cops
SMALL GROUP ACTIVITIES	paint letter R using red colors (paint, crayons, markers); re-emphasize R
SPECIAL ACTIVITIES (site visits, special events, etc.)	go for nature walk; collect items for an art collage and pick up litter (teachers handle litter for sanitary reasons)

Thursday:

GROUP TIME (songs, stories, games, discussions, etc.	conclude all that we have learned from our topic of recycling, reusing, and reducing this week; some combined topic for two days due to some attending MWF, some T/TH, some M-F
STORY TIME - book	Michael Recycle & Litterbug Doug
SMALL GROUP ACTIVITIES	continue learning about R; what other words begin with R besides Recycle, Reuse, Reduce; choose art activity form list above

SPECIAL ACTIVITIES (site visits, special events)	

Friday:

GROUP TIME (songs, stories, games, discussions, etc.	conclude all that we have learned from our topic of recycling, reusing, and reducing this week; some combined topic for two days due to some attending MWF, some T/TH, some M-F
STORY TIME - book	The Garage Monster
SMALL GROUP ACTIVITIES	continue learning about R; what other words begin with R besides Recycle, Reuse, Reduce; choose art activity form list above
SPECIAL ACTIVITIES (site visits, special events, etc.)	Clean up the playground area of the cardboard boxes to recycle – flatten boxes

Lesson Plan Notes: Add to our art supplies: peanut butter jars, plastic soda bottles of various sizes, bubble wrap, pvc pipes, old measuring cups, film canisters, old sanitized toothbrushes (or new ones), magazines, newspapers, greeting cards, crepe paper, ribbon, wallpaper books, various sizes of grocer bags, old calendars, Pringle cans, cardboard boxes (various sizes), paper towel and toilet paper cardboard rolls, Kleenex boxes, colorful lids from laundry detergent bottles.

ATTACHMENT G
INFORMATION PLAN

Stakeholder/Audience: Television Viewers

1. How will information be used: To educate community residents on recycling opportunities

2. How will information be presented/ transmitted: News releases via Internet and/or phone contact with local TV stations to include KMOU(8), KMIZ(17), KNLJ(25), KQFX(22), KRCG(13)

3. Media and formats to be employed: On-site interviews, special interest segments, community events calendars

4. Reporting and distribution schedule/ frequency: During construction and at ribbon-cutting event when project is complete

5. Who will be presenting, communicating, transmitting: Local TV news anchors and correspondents; new releases by TLCLC

Stakeholder/Audience: Radio Listeners

1. How will information be used: To educate community residents on recycling opportunities

2. How will information be presented/ transmitted: News releases via Internet and/or phone contact with local and regional radio stations

to include LKPLA(FM); KATI(FM); KSSZ(FM); KMOX(AM); KWWR(FM); KFRU(AM)

3. Media and formats to be employed: On-site interviews, special interest segments, community events calendars

4. Reporting and distribution schedule/ frequency: During construction and at ribbon-cutting event when project is complete

5. Who will be presenting, communicating, transmitting: Local radio news reporters with on-site interviews, etc.; news releases by TLCLC

Stakeholder/Audience: News Print Readers

1. How will information be used: To educate community residents on recycling opportunities

2. How will information be presented/ transmitted: News releases to area newspapers and magazines, to include: Columbia Tribune; Columbia Missourian; Inside Columbia; Columbia Magazine .com

3. Media and formats to be employed: Special interest articles; community events calendars

4. Reporting and distribution schedule/ frequency: During construction and at ribbon-cutting event when project is complete

5. Who will be presenting, communicating, transmitting: News releases by TLCLC

Stakeholder/Audience: TLCLC Parents and Relatives

1. How will information be used: Inform parents of DNR grant program and recycling education efforts of TLCLC

2. How will information be presented/ transmitted: TLCLC newsletter and website

3. Media and formats to be employed: newsletter items; project progress on website

4. Reporting and distribution schedule/ frequency: Following grant award; during construction; ribbon-cutting event; post-construction recycling education

5. Who will be presenting, communicating, transmitting: TLCLC

Stakeholder/Audience: TLC Congregation

1. How will information be used: Inform congregation of DNR grant program and recycling education efforts of the TLCLC

2. How will information be presented/ transmitted: Weekly "Church News" newsletter and monthly "News of the Son" newsletter

3. Media and formats to be employed: Updates on project through completion

4. Reporting and distribution schedule/ frequency: Weekly and monthly through completion and ribbon-cutting ceremony

5. Who will be presenting, communicating, transmitting: TLCLC and Trinity Lutheran Church

ATTACHMENT H
SCOPE OF WORK

Task 1: Fall 2011 to Present - Planning of playground project completed by TLCLC administration and staff, Major Projects Coordinator, and TLCLC Board of Early Childhood Education.

Task 2: January 2012 – Completion of DNR grant application by Major Projects Coordinator.

Task 3: April 2012 - Contract with surfacing material vendor completed and materials ordered.

Task 4: April 2012 – Quarterly report due.

Task 5: May/June/July 2012 – Removal of old pea gravel surfacing material completed by TLCLC, parent volunteers, and church volunteers.

Task 6: May/June/July 2012 – Site excavated for proper slope, compacted aggregate base complete in accordance with manufacturer/vendor specifications.

Task 7: July 2012 – Quarterly report due.

Task 8: May/June/July 2012 – Installation of new pour-in-place material completed by selected vendor with the help of TLCLC and church volunteers as required.

Task 9: July/Aug 2012 – Playground cleanup and landscaping completed by TLCLC and church volunteers.

Task 10: August/September 2012 – Information plan implemented; grand opening / ribbon-cutting ceremony held.

Task 11: October 2012 – Final quarterly report due.

ATTACHMENT I
PROJECT TIMELINE GRAPH[2]

Task 1 to be completed in Project Month 1

Task 2 to be completed in Project Month 1

Task 3 to be completed in Project Month 4

Task 4 (chart blank for this task)

Task 5 to be in process in Project Months 5 through 7 with completion in Project Month 7

Task 6 to be in process in Project Months 5 through 7 with completion in Project Month 7

Task 7 (chart blank for this task)

Task 8 to be in process in Project Months 5 through 7 with completion in Project Month 7

Task 9 to be in process in Project Months 7 and 8 with completion in Project Month 8

Task 10 to be in process in Project Months 8and 9 with completion in Project Month 9

Quarterly Reports to be done in Project Months 4, 7, and 10

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[2] This Project Timeline Graph was originally in table form but has been revised for format purposes.

ATTACHMENT J
Scrap Tire Program Grant Application

1) Young Children Play Area

2) Older Children Play Area

Denial Letter to Trinity Lutheran Church from Missouri Department of Natural Resources

STATE OF MISSOURI
DEPARTMENT OF NATURAL RESOURCES
Jeremiah W. (Jay) Nixon, Governor
Sara Parker Pauley, Director
www.dnr.mo.gov

May 21, 2012

Ms. Gail Schuster, Director
Trinity Lutheran Church Child Learning Center
2201 W. Rollins Road
Columbia, MO 65203

Re: 2012 Playground Scrap Tire Surface Material Grant – Applicant Number T12013

Dear Ms. Schuster:

Thank you for the time and effort you have taken to respond to the Missouri Department of Natural Resource's recent offering of financial assistance through the 2012 Playground Scrap Tire Surface Material Grants. The department appreciates your candor in explaining how the former "Trinity Lutheran Child Learning Center" was merged into the surviving corporation "Trinity Lutheran Church of Columbia, Missouri, Inc." back in the 1980s. However, after further review of applicable constitutional limitations, the department is unable

to provide this financial assistance directly to the church as contemplated by the grant application. Please note that Article 1, Section 7 of the Missouri Constitution specifically provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion..."

Again, thank you for your time and effort spent on applying for a Playground Scrap Tire surface Material Grant. If you have any questions or need further clarification, please contact Mr. Dan Fester of my staff at (573) 751-5401. Our mailing address is P.O. Box 176, Jefferson City, Missouri 65102-0176.

Sincerely,

SOLID WASTE MANAGEMENT PROGRAM

Chris Nagel
Director

CN:ktl

c: Mr. Phillip Glenn, Project Manager
Mid-Missouri Solid Waste Management District
Northeast Regional Office via Electronic Shared File

Explanation of Denial Email from Kim Tschirgi to Phil and Sylvia Glenn

Phil and Sylvia Glenn

From: "Tschirgi, Kim" <kim.tschirgi@dnr.mo.gov>
Date: 05/23/2012 6:22 AM
To: <glennhaven@ktis.net>
Subject: 2012 Playground Scrap Tire Surface Material Grant Ranking/Score – Trinity Lutheran Church Child Learning Center

Hi, Glen,

I have provided the scoring information you requested during our phone conversation yesterday.

Trinity Lutheran's application received 640 total points and ranked 5th out of 44 applications. The top score was 665 points.

We were able to fund 14 projects this year.

Thank you and have a great summer!

Sincerely,

Kim Tschirgi, Planner
SOLID WASTE MANAGEMENT PROGRAM
1730 E. Elm, lower level
P.O. Box 176
Jefferson City, MO 65102
573-751-5401

RECORD AND BRIEFS

No. 15-577

IN THE

Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHRIS KOSTER
Attorney General of Missouri

JAMES R. LAYTON
Solicitor General,
Counsel of Record
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-1800
Fax: (573) 751-0774

Counsel for Petitioners

Library of Congress
Law Library

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STATEMENT OF THE CASE

Missouri's Scrap Tire Program competitively awards grants for the purchase of recycled tires to resurface playgrounds. The program is funded solely by setting aside a portion of a fee collected on new tires sold. Mo. Rev. Stat. § 260.273.6(2) (Cum. Supp. 2014). The program is administered by the Missouri Department of Natural Resources; Respondent Sara Parker Pauley is the Department Director.

Forty-four applicants sought grants from the funds available in the 2012 program. But there were sufficient funds to award grants to only 14 of those.

Petitioner Trinity Lutheran Church of Columbia, Missouri, was one of the 44 applicants. Trinity Lutheran sought to place the rubber surface on a church playground used by Trinity Lutheran's Learning Center. The Learning Center, for preschoolers, has been a Trinity Lutheran Church ministry since 1985. As the District Court found, "Through the Learning Center, Trinity Lutheran teaches a Christian world view ... including the Gospel." Petition Appendix ("Pet. App.") 35a.

Missouri's constitution, adopted in 1945, includes a specific limitation on the State's granting of funds to churches:

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect

> or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

Mo. Const. Art. I, § 7 (1945).

Although on other criteria Trinity Lutheran ranked high among the 44 applicants, the Department declined to award a grant to Trinity Lutheran because the grant would have been "money ... taken from the public treasury ... in aid of [a] church."

Trinity Lutheran filed suit in the U.S. District Court for the Western District of Missouri, seeking injunctive and declaratory relief against the Department. The District Court granted the Department's motion to dismiss the complaint. Pet. App. 34a-75a. The U.S. Court of Appeals for the Eighth Circuit affirmed. Pet. App. 1a-31a.

REASONS FOR DENYING THE PETITION

In *Locke v. Davey*, 540 U.S. 712 (2004), this Court rebuffed a challenge to a state constitutional limitation on the movement of funds from a state treasury to religious institutions or endeavors. Ever since, there have been pleas to reverse or limit the *Locke* holding.

This case is unlike most of the cases in which lower courts and this Court have heard such pleas. Here, the question is not whether the State can tell parents or students that although they have access to public funds for tuition, they cannot use those funds for education at a church-run school or for religious study. Nor is the question whether a state can exclude churches and other religious institutions from a program that otherwise provides benefits to everyone. Rather, it is whether states are required by the U.S. Constitution to violate their own constitutions and choose a church to receive a grant when that means turning down non-church applicants. That is not a question as to which there is an intercircuit conflict, nor one that otherwise demands this Court's review at this time.

I. In most cases on which Trinity Lutheran relies to find a conflict or confusion, public money flows as determined by private parties.

It has not been unusual for courts—including this Court—to face questions regarding the flow of public funds to schools where the choice of school is made by a parent or student, and state laws or constitutional provisions that affect that flow.

Principal among the cases addressing such questions is *Locke v. Davey*. There, the plaintiff "chose to attend Northwest College ... a private, Christian college ... to pursue a double major

in pastoral studies and business management/ administration." *Id.* at 540 U.S. at 718.

Another such case is currently on the Court's certiorari docket: *Colorado State Board of Education v. Taxpayers for Public Education*, No. 15-558. There, the question is the flow of public funds, on the parents' choice, to just secular rather than to both secular and sectarian schools.

Two of the cases on which Trinity Lutheran relies also fit this mold. *Eulitt v. Maine*, 386 F.3d 344 (1st Cir. 2004), was brought by parents who "send their daughters to St. Dominic's Regional High School, a Catholic secondary school that is indisputably sectarian." *Id.* at 347. They sought to have education funds go to the particular school they chose. In *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), the question was the flow of state funds to pay tuition for individual students who chose to attend a college "held [to be] pervasively sectarian by the State." *Id.* at 1250.

This is not such a case. The decision regarding who would receive the state funds here was a governmental one. And that brings into play a different consideration: the government's ability to decide what message of endorsement it wants to send. That courts may be divided in cases involving school choice does not justify the grant of certiorari in this case.

II. Giving a particular church public money to improve its property to better serve a church ministry is a form of government speech.

The premise that a state would send a message—that it would speak—when funding one person rather than another is hardly novel. It is comparable to the message that contributors send when they make a contribution to a candidate for public office—a message recognized in *Buckley v. Valeo,* 424 U.S. 1, 21 (1976) (campaign contributions are "symbolic" speech and "general expression[s] of support"), and 244 (Burger, C.J., concurring and dissenting) (a contribution "is clearly speech by the 'contributor' himself."). *See also Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 400 (2000) ("[t]hrough contributions the contributor associates himself with the candidate's cause.").

Trinity Lutheran affirms that by choosing one recipient over another, the State sends a message—*i.e.*, it speaks. Thus Trinity Lutheran complains that the Department's "religious exclusion *sends a message* that some children are less worthy of protection simply because they play on a playground owned by a church." Pet. at 24 (emphasis added). But adopting the rule that Trinity Lutheran will ask this Court to adopt, if the petition is granted, would not eliminate messages. In fact, Trinity Lutheran would still require the Department to send a message—but a message that those who join a particular

church's ministry and thus play at that church are more worthy than those who decline that invitation and play where improvements have not been made because the available State money went to that church.

Just this year, this Court addressed the authority of states to choose the messages they want to convey. The Court held, with regard to license plates, that "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015). The Eighth Circuit was not asked, of course, to answer the question of whether government speech is treated differently when churches are involved. This Court can wait for a case in which a court has been asked to apply *Walker* to a situation involving the grant of funds to a church—or for a conflict to arise among cases in which the government itself decided where to direct its limited funds.

III. In *Badger Catholic*, the Seventh Circuit addressed a state-created "public forum" for free speech—and recognized distinctions pertinent to this case.

Of the handful of cases that form the basis for Trinity Lutheran's claims of intercircuit conflict and confusion, only one is based on choices made, as here, entirely by a governmental entity: *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 (2010). And that case was decided on First Amendment Free Speech, not religion, grounds. There, the University of Wisconsin created a "public forum" through which it allocated funds for speech by campus groups. The University then restricted use of the forum, excluding certain religious speech. The Seventh Circuit rejected that restriction, without reaching the critical points addressed by the Eighth Circuit in this case.

But Judge Easterbrook, writing for the majority, did make some notable observations about the law as it stands post-*Locke*. He concluded that the "neutral funding" rule that Trinity Lutheran sought below is not the law:

> Arguments such as Professor (then judge, and now professor again) McConnell's that the Constitution requires a state to follow a principle of neutral funding have not carried the day at the Supreme Court.

Id. at 779. And he concluded that "the state's decision in *Locke* concerned how to use funds over which it had retained plenary control." *Id.* at 780. In doing so, he referred to government funding decisions as "government speech":

> Choosing which programs to support and which not, whether by having a department of philosophy but not a seminary, or by granting scholarships to study theology but not prepare for the ministry, is a form of government speech.

Id. In the Seventh Circuit's eyes, at least, there is a "line [between] selective funding as permissible public choice, versus selective funding as impermissible private choice in a public forum." *Id.* It is only "[o]nce it creates a public forum [that] a university must accept all comers within the forum's scope." *Id.*

This is not a "public forum" case. It is a case of the State choosing where to spend limited funds over which it "retains plenary control." It is one where the State gives its implicit imprimatur to the place or activity on which the funds are spent—here, if Trinity Lutheran is right, a particular congregation of the Lutheran Church-Missouri Synod. According to the *Badger Christian* majority, this case is distinguishable.

IV. This case does not presage the denial of "routine benefits" to churches.

To persuade the Court that this case is more significant than it really is, Trinity Lutheran hypothesizes that the State might, at some future date, "apply[] its constitution to deny routine benefits—such as sewer and water service, and police and fire protection—to religious groups." Pet. at 12; *see also* Pet. at 19.

The reference to sewer and water service is a red herring. Those services, to the extent they are provided by municipalities and other political subdivisions of the State, are provided for a fee—not as a benefit from "the public treasury"—and thus would not fall within Missouri's Art. I, § 7 no matter how it is construed.

The police and fire example, because they are services funded from the "public treasury," could move closer to the mark. But that is a farfetched hypothetical. Police and fire protection policies do not differentiate between or express a preference for one possible recipient over another. If police and fire chiefs—or individual police officers or firefighters—make such a choice, it is based on the exigencies of the particular, immediate circumstances. Missouri mayors do not direct police or fire chiefs to protect churches rather than other, secular persons or property—or vice versa. And there is no reason to believe that if the Eighth Circuit

decision remains in place, they will begin to do so.

V. Article I, § 7 was not included in the 1945 Missouri Constitution because of religious bigotry.

At a key point in its efforts to distinguish this case from *Locke v. Davey*, Trinity Lutheran claims that Mo. Const. Art. I, § 7 "is born of religious bigotry." Pet. at 28. Trinity Lutheran makes that claim because, it says, the predecessor of that provision "was enacted in 1875—the same time as the federal Blaine Amendment was proposed and debated." *Id.* But Trinity Lutheran cites nothing from the 1943-44 Missouri constitutional convention, nor anything from the 1944-45 campaign, to suggest that in 1945 the people of Missouri chose to retain that provision because of any religious animus.

The Missouri constitutional debates do not suggest animus. Rather than resurrect whatever may have motivated adoption of the Blaine Amendments in the prior century, those who discussed the provision at the constitutional convention nearly 70 years later harkened back to the 18th Century need for protection from having a state church, and paying for it through public funds. DEBATES OF THE CONSTITUTIONAL CONVENTION OF MISSOURI, 1943-1944, pp. 1504-05 ("[I]n some of the New England towns, the town council levied taxes against the members of

the congregation for the support of the church. And one of the fundamental, one of the things that is involved in this language was to stop that sort of thing." "[T]hat the first two and one half lines, the purpose of them was simply to prevent the establishment of the church of England or any other church as an official sacreligion [sic].". The brief discussion at the convention confirms that the drafters wanted "to protect public monie[s] against being used for religious purposes," or to "protect[] against misuse of public funds for religious purposes. *Id.* at 1507. Such protection is not animus.

If this Court believes that animus or bigotry may have motivated the adoption of the Blaine Amendments in the 19th Century and that such motivation merits consideration in the 21st Century, it should take up that question in a case that lacks intervening 20th Century action.

VI. *Colorado Christian University* did not define a competing level of scrutiny for similar equal protection claims.

Trinity Lutheran's last claim is that there is a post-*Locke* split among the circuits with regard to the level of scrutiny to be given to the states' decisions not to channel their funds to religious institutions or pursuits. On the one side, Trinity Lutheran lists the Eighth Circuit, in this case, and the First Circuit, in *Eulitt*, as saying that rational basis review applies. Pet. at 31. On the

other side, Trinity Lutheran lists the Tenth Circuit, citing its decision in *Colorado Christian University*.

Trinity Lutheran is right that the Tenth Circuit has expressed displeasure with the rational basis approach used in *Eulitt* and mentioned, and perhaps used, by the Eighth Circuit here. But the Tenth Circuit did not, in its holding, specify a level type of scrutiny. Rather, that court said, "we need not decide precisely what level of scrutiny applies to the denominational discrimination in this case, because the State scarcely has any justification at all." 534 F.3d at 1267.

By declining to set out its own, competing standard, the panel in *Colorado Christian University* left other Tenth Circuit panels free to define the appropriate level of scrutiny in similar cases. We do not know, now, whether that definition will differ appreciably from the scrutiny given in the First and Eighth Circuits. This Court can and should wait for a case in which some court actually defines a different, competing level of scrutiny—binding in that court—that this Court can evaluate.

CONCLUSION

For the reasons stated above, the Court should deny the petition.

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BRIEFS

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No. 15-577

In the
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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CORPORATE DISCLOSURE STATEMENT

Petitioner is a nonprofit religious corporation. Petitioner does not have a parent corporation and no publicly held corporation owns any portion of any of Petitioner.

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INTRODUCTION

Respondent does not even attempt to defend the Eighth Circuit's decision under which it prevailed. Instead, Respondent distances itself from the court's reasoning by attempting to reframe the question presented as "whether states are required by the U.S. Constitution to violate their own constitutions and choose a church to receive a grant when that means turning down non-church applicants." Br. in Opp. at 3. Unfortunately, this is what the confusion and conflict over *Locke v. Davey*, 540 U.S. 712 (2004), has wrought—a State that defines neutrality as treating religious organizations worse than everyone else. This is not neutrality, but hostility to religion which violates the Free Exercise and Equal Protection Clauses.

In contrast, under Petitioner's rule, the State would not be choosing to fund a church instead of a non-church applicant. It would neutrally select scrap tire grant recipients based on *merit* without regard to religion. The grant program uses funds raised from a fee on new tires paid by religious and nonreligious citizens alike. Pet. App. 86a-88a. It funds only neutral materials—safe rubber playground surfaces. Pet. App. 90a. The criteria used to select grant recipients is completely neutral, other than the blanket exclusion of churches, including factors such as: (1) a description of the need for the project, (2) descriptions of how the rubber material

will be contained or supported, and (3) the poverty level of citizens in the surrounding area.[1]

Thus, the scrap tire program involves selection by merit alone based on completely secular and neutral criteria. Respondent wrongly states that Trinity Lutheran ranked higher "on *other* criteria" when it applied. Br. in Opp. at 2 (emphasis added). The truth is that Trinity Lutheran ranked higher on *all* secular criteria than the vast majority of other applicants. That is why the State scored its application fifth out of forty-four submissions in a year in which the State awarded fourteen grants. Pet. App. 144a. Critically, it is uncontested here that Trinity Lutheran would have received a grant but for the fact that it is a church. *See* Br. in Opp. at 2.

Respondent also wrongly asserts that awarding Trinity Lutheran a grant would benefit only those children who attend the church's programs. *See* Br. in Opp. at 5-6. This is untrue as children from the surrounding community regularly play on the church's playground. Pet. App. 133a. And the DNR scored Trinity Lutheran's application near the top of the list of applicants because of the high level of poverty in the surrounding community. *See* DNR Pub. 2425. But even if it were true, children who attend the church's programs are no less worthy of

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[1] *See* Pet. App. 91a-92a. A complete list of the criteria DNR uses to score scrap tire grant applications may be found in DNR Publication 2425, *available at* http://dnr.mo.gov/pubs/pub2425.htm (last visited Dec. 13, 2015).

protection than children who attend a secular program.

Meritorious selection is no detriment to non-church groups. In fact, even if Trinity Lutheran had been allowed to participate, thirteen out of fourteen grants would have gone to secular groups. The State scored Trinity Lutheran's application highly based solely on secular criteria but it was denied based solely on the church's religious status. Ironically, the State set up the neutral criteria, ranked Trinity Lutheran fifth highest, and now complains about the Church's ranking. In these circumstances, the State is simply exhibiting hostility to religion.

Respondent also argues that it has limited funds, so it can allocate those resources to non-church organizations. But the government cannot allocate scarce funds in a discriminatory manner. The Court rejected Respondent's argument directly in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). There, the Court stated that it is "incumbent on the State... to ration or allocate the scarce resources on some acceptable neutral principle." *Id.* at 835.

Fundamentally, what Respondent fails to appreciate is that Missouri's asserted interest "in achieving greater separation of church and state than is already ensured under the Establishment Clause ... is limited by the Free Exercise Clause." *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).[2] The

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[2] The Court in *Widmar* addressed Missouri's no-aid provision—the same provision the DNR relied upon here to discriminate

lower courts are in conflict and confusion over when this Free Exercise limit applies. This Court should grant the Petition to resolve that question.

ARGUMENT

I. There is no government speech in this program.

Respondent proposes an exceedingly broad definition of government speech that would give it *carte blanche* authority to discriminatorily bestow any funds over which it exercises plenary control. But Respondent never raised a government speech argument below and the Eighth Circuit never advanced this rationale. Consequently, this argument is waived and cannot be raised for the first time in opposition to a petition for certiorari. *See Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 522 (1991) (declining to address issue raised by respondent for the first time in its brief in opposition to the petition for writ of certiorari and not encompassed within the question presented by the petition); *see also J. Truett Payne Co., Inc., v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) ("We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed ....").

Indeed, Respondent acknowledges that "[t]he Eighth Circuit was not asked ... to answer the question of whether government speech is treated

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against Trinity Lutheran based solely on its religious status. *See Widmar*, 454 U.S. at 275-6.

differently when churches are involved." Br. in Opp. at 6. This Court should recognize Respondent's argument for what it is—a post-hoc attempt to invent a justification for the DNR's discrimination against Trinity Lutheran.

Moreover, there are good reasons to reject the government speech argument. First, recycled tires are not speech. There is no speech here at all. Providing funding for a private group to purchase scrap tire material to surface a playground is unlike funding a private group to communicate a specific government message. This Court has only characterized government benefit programs as government speech when they are designed to convey a specific governmental message. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541-42 (2001) (recognizing the distinction between government programs designed to convey a message the government wishes to send, and other programs not designed to convey a message).

The Court held that the program in *Velazquez* was not government speech because the government "designed th[e] program to ... accomplish its end of assisting welfare claimants in determination or receipt of their benefits." *Id.* at 542. The same is true here. The scrap tire program is designed to provide safe play areas for children, reduce the amount of scrap tires, and encourage a market for recycled scrap tires. Pet. App. 89a. The scrap tire program was never intended to convey a specific governmental message and is therefore not government speech.

Second, this Court did not hold in *Locke v. Davey* that states may single out religious groups for exclusion from general benefit programs whenever the state sees fit. Instead, the Court has held that "[i]n some cases, a funding condition can result in an unconstitutional burden on First Amendment rights." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328 (U.S. 2013). As this Court has recognized, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit.'" *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003). Nor may the State "exclude [religious adherents of any faith] because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 16 (1947). For doing so would "hamper ... citizens in the free exercise of their own religion." *Id.*

Not once has this Court countenanced the rule Respondent urges, *i.e.*, to permit states to administer government benefit programs without concern for constitutional limitations. *Cf. Widmar*, 454 U.S. at 267 (recognizing that once the government establishes a benefit program it must "justify its discriminations and exclusions under applicable constitutional norms"). *Locke* certainly does not stand for that proposition.

Curiously, Respondent contends that *Locke* only applies to cases involving the "flow of public funds to schools," Br. in Opp. at 3, and plainly states that "[t]his is not such a case." *Id.* at 4. Respondent's

recognition that *Locke* does not apply here necessarily means that the Eighth Circuit's reliance on *Locke* was misplaced and its judgment in Respondent's favor groundless. That is all the more reason for this Court to grant review, as in *Locke's* absence, *Widmar's* nondiscrimination rule applies. *See* 454 U.S. at 276 ("[T]he state interest asserted here in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the [Equal Protection] Clause as well.").

In *Locke*, this Court concluded that the program fell within the "play in the joints" between the religion clauses, 540 U.S. at 718-19, based on unique historical concerns related to government funding of the religious training of clergy. *Id.* at 721-22. *Locke* held that this "play in the joints" was only large enough to apply to that unique historical concern. And it certainly did not hold that "play in the joints" confers *carte blanche* authority when the government exercises "plenary control" over the funds at issue.

Yet that is the authority Respondent claims in administering the scrap tire program; the power to categorically deny a neutral secular benefit to a church solely because it is a church. And, as explained in the Petition for Certiorari, that issue has long divided the lower courts. *See* Pet. for Cert. at 13-20.

Additionally, Respondent's reliance on *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,

135 S. Ct. 2239 (2015), is entirely misplaced. Funding for safe rubber playground surfaces has no expressive component comparable to that found in *Walker*. It does not convey a state message like a specialty license plate that functions as a "government ID[]" or a permanent government monument. *Id.* at 2249.

By excluding Trinity Lutheran, the DNR simply exhibited undifferentiated religious hostility prohibited by the Free Exercise and Equal Protection Clauses. The Eighth Circuit upheld that exclusion because of confusion surrounding the interpretation of *Locke*, a case which Respondent concedes does not apply here. This Court should grant the Petition to clarify that *Locke v. Davey* does not confer on states a general authority to exclude religious groups from neutral government benefit programs.

II. The lower courts are in conflict regarding the proper interpretation of *Locke*.

Respondent attempts to avoid the lower court conflict concerning *Locke* by placing an artificial limit on their scope, *i.e.*, by arguing that they involve funding decisions made by private choice and not by government decision. *See* Br. in Opp. at 3-4. However, that is a distinction without a difference. It is true that the program in *Locke* involved "the independent and private choice of recipients." 540 U.S. at 719.

But, as explained in the Petition for Certiorari, private choice is not the only way to include religion

and comply with the Establishment Clause. *See* Pet. for Cert. at 26-27. This Court has upheld government programs that provide direct funding to religion where there was no private choice, but the aid involved had no religious content and furthering religious activities was either non-existent or *de minimis*. *See* Pet. for Cert. at 26-27 (citing cases). Here, Trinity Lutheran is not asking for a grant to buy prayer books, but simply to have its application for a safe rubber playground surface for children judged on the same neutral criteria as other nonprofit daycares.

There is no doubt that Missouri could include churches in the scrap tire program without violating the Establishment Clause. Even the Eighth Circuit agreed with this proposition. *See* Pet. App. at 9a. The question is whether Respondent is prohibited by the Free Exercise and Equal Protection Clauses from categorically excluding churches from the scrap tire program. The resolution of that question turns on the interpretation of *Locke*. Are the lower courts, like the First and Eighth Circuits and the Colorado Supreme Court, correct that religion may be categorically excluded from an otherwise neutral grant program, or are the lower courts, like the Seventh and Tenth Circuits, correct that *Locke* does not allow for such categorical religious discrimination? Only this Court may resolve this question and it should grant the Petition to do so.

Respondent also relies on dicta in *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 (7th Cir. 2010), to say that selective funding by the government is permissible unless the government creates a public

forum. *See* Br. in Opp. at 7-8. However, the only example cited for this proposition in *Badger Catholic* was this Court's opinion in *Locke*. And the *Badger Catholic* opinion noted the limits of *Locke*; that it did not apply in instances where, as here, the program evinces hostility to religion or where the funds were distributed as part of a public forum. *Id.* at 780. Nowhere did *Badger Catholic* suggest that a state can engage in selective funding when it retains plenary control over the distribution of funds, as the student government did in that case.

All Respondent has done is to highlight the confusion that reigns in lower courts about the proper interpretation and application of *Locke*. That is precisely why this Court should grant review.

III. This case does presage the denial of numerous benefits to churches.

Respondent admits in surprising candor that Trinity Lutheran's assertion that the Eighth Circuit opinion would allow for the denial of basic services to churches, such as police and fire protection, "could move closer to the mark." Br. in Opp. at 9. Respondent never denies that this is the logical conclusion of the Eighth Circuit's opinion. Misreading *Locke* as justifying the categorical exclusion of churches from otherwise neutral government benefit programs leads ineluctably to the conclusion that a state may choose to apply that rule in numerous other contexts, including the provision of basic services.

Indeed, as *amici* ably demonstrate, the Eighth

Circuit's opinion may lead to the categorical exclusion of churches from all kinds of neutral government benefits, including:

> vouchers and scholarships for schools; subsidies for textbooks and school transportation; tax credits for scholarships; grants for construction projects; funding for rehabilitation centers; and subsidies for resurfacing playgrounds with rubber made from recycled tire scrap, like the Missouri program at issue here.

Amicus Br. of Ass'n of Christian Sch. Int'l & Lutheran Church—Missouri Synod at 16-24; *see also* Amicus Br. of Ethics & Religious Liberty Comm'n at 11-14. It is certainly not "farfetched" to believe that blanket religious exclusions, such as the one the DNR instituted in this case, if given constitutional sanction, will perpetuate in numerous contexts.

IV. Respondent does not deny that Article I, Section 7 of the Missouri Constitution was born of religious bigotry.

Respondent engages in a linguistic shell game by arguing that the 1945 Missouri Constitution and the record of the debates surrounding that constitution do not suggest religious animus. *See* Br. in Opp. at 10. Yet, tellingly, Respondent does not deny that the no-aid provision was steeped in religious bigotry at the time of its enactment.[3] All

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[3] The history of anti-Catholicism in Missouri was explained and documented in the Amicus Brief of the Becket Fund for

Locke requires is a "credible connection" between the Blaine Amendment and Article I, Section 7. *See* 540 U.S. at 723 n.7. As explained in the Petition, there is such a credible connection that even Respondent does not deny.

Respondent simply claims that the 1945 Missouri Constitution chose to retain the no-aid provision and that this intervening decision cures the religious bigotry underlying its original enactment in 1875. However, Respondent admits that there was only a "brief discussion at the [1943-44] constitutional convention about the no-aid provision." Br. in Opp. at 11. Merely choosing to keep a discriminatory provision with nary a debate hardly wipes the slate clean. This Court recognized as much in *Hunter v. Underwood*, 471 U.S. 222 (1985), where the Court struck down a state constitutional provision disenfranchising persons convicted of crimes involving moral turpitude.

In *Hunter*, the State of Alabama tried to argue that, despite the original discriminatory purpose of the provision, "events occurring in the succeeding 80 years had legitimated the provision." *Id.* at 232-33. This Court strongly rejected that argument: "[W]e simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." *Id.* at 233.

The same is true of the Missouri no-aid

Religious Liberty below. *See* Amicus Br. of Becket Fund, 8th Cir. Case No. 14-1382, at 6-16.

provision here. It was born of religious bigotry and it continues to discriminate against religious organizations today.

V. The Circuit Courts are in conflict over Equal Protection analysis in cases that also involve Free Exercise claims.

Respondent attempts to minimize the conflict in the lower courts on the appropriate level of scrutiny to apply in cases presenting an equal protection claim involving religion. Yet one cannot simply ignore, as Respondent does, the Tenth Circuit's statement that:

> [W]e conclude that statutes involving discrimination on the basis of religion, including interdenominational discrimination, are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause ...."

Colorado Christian Univ. v. Weaver, 534 F.3d 1245, 1266 (10th Cir. 2008) (citations omitted).

That general proposition, taken from this Court's precedents, squarely conflicts with the Eighth Circuit's decision to apply rational basis review here based on *Locke*. This Court should grant review to resolve the conflict in the lower courts regarding the appropriate level of scrutiny that applies under the Equal Protection Clause when a state denies a religious organization equal treatment based solely on its religious status.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, this Court should grant review.

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RECORD AND BRIEFS

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In The Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA,

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v.

SARA PARKER PAULEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), addressing a variety of issues of constitutional law. The ACLJ is dedicated, *inter alia*, to religious liberty and freedom of speech.

SUMMARY OF ARGUMENT

It should be an obvious norm of constitutional law that a government entity cannot discriminate against a church for the sole reason that it is a church. Yet this Court has never squarely so held. This case presents an excellent vehicle for a holding that will repair this gap in this Court's precedents.

ARGUMENT

Surprisingly, there is no case among this Court's precedents directly holding that the federal and state governments cannot discriminate against a church,

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[1]Counsel of record for the parties received timely notice of the intent to file this brief. Sup. Ct. R. 37.2(a). The parties in this case have consented to the filing of this brief. A copy of the consent letters are being filed with this brief. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

synagogue, or mosque, as such, for the sole reason that said entity is a religious body. The state of Missouri, and the court below, exploited this lacuna to declare that petitioner Trinity Lutheran Church (TLC) could be disqualified, *solely because TLC is a church*, from participation in and assistance under an undisputably secular program (viz., for converting used automobile tires into safe playground surfacing), even though TLC is otherwise completely qualified and eligible.

To be sure, this Court has held, in the context of a speech forum, that it violates the First Amendment to exclude an entity because of its religious message, *e.g.*, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), including when a funding program is at issue, *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). This Court has held that it violates the First Amendment (specifically, the Free Exercise Clause) to target clergy for special political disabilities. *McDaniel v. Paty*, 435 U.S. 618 (1978). Indeed, this Court expressly declared that "State power is no more to be used so as to handicap religions than it is to favor them." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947).

. This Court has also held that the Equal Protection Clause bars restrictions that rest on no more than "a bare desire to harm" a particular group. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-47 (1985) (citing *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

Thus, it would seem obvious that a government's posting of a "no churches, synagogues, or mosques allowed" sign, whether literal or figurative, would run

afoul of both the Equal Protection Clause and the religion and speech[2] clauses of the First Amendment.

Yet this Court has never so ruled. Moreover, ambiguity in this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), has left the lower courts to divide over whether in fact a "no churches" rule might be permissible. *Compare Trinity Lutheran Church v. Pauley*, 788 F.3d 779 (8th Cir. 2015) (decision below, approving exclusion of churches as such), *with Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008) (condemning "the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support").

May a government program of flood relief exclude houses of worship, and only houses of worship? May a municipality provide taxpayer-funded police, fire, and rescue to all other residents yet exclude only churches, synagogues, and mosques? *Cf. Everson*, 330 U.S. at 17-18 (describing such services as "indisputably marked off from the religious function" of church schools). And, here, may a state categorically exclude churches while otherwise allowing any entity that maintains a

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[2]Petitioner TLC brings its challenge under the Free Exercise and Equal Protection Clauses. While TLC apparently does not directly launch a Free Speech attack, the standards for message-based discrimination are the same under the Free Speech and Equal Protection Clauses. *E.g.*, *Carey v. Brown*, 447 U.S. 455, 463 (1980); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 n.4 (1992). Moreover, discrimination against an entity because of its exercise of a fundamental right – here, the religious expression and association that define a church – triggers strict scrutiny under the Equal Protection Clause. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (classifications affecting fundamental rights trigger strict scrutiny).

playground to apply for resurfacing aid, for the safety of children who play there? The answer in all such cases should be a resounding "no." Yet, as the court below illustrated, that answer is far from clear to lower courts.

This Court should grant review both to resolve the circuit split and to provide much-needed clarification that, under a Constitution formed by a people yearning for religious freedom, while government may not establish a church, it also may not categorically relegate religious institutions to second-class status.

CONCLUSION

This Court should grant review and reverse the judgment below.

Respectfully submitted,

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Dec. 7, 2015

AND 1
BRIEFS

Supreme Court, U.S.
DEC - 7 2015

No. 15-577

IN THE

Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR,
MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL AND LUTHERAN CHURCH—MISSOURI SYNOD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Association of Christian Schools International ("ACSI") is a nonprofit organization that supports and promotes Christian schools across the United States and around the world. Based in Colorado Springs, ACSI has approximately 24,000 member schools—over 3,000 in the United States—that serve more than 5.5 million students worldwide. In addition to providing various services for Christian schools (including teacher certification, school accreditation, and textbook publishing), ACSI advocates for their fair legal treatment.

The Lutheran Church—Missouri Synod, a Missouri nonprofit corporation, has approximately 6,150 member congregations which, in turn, have approximately 2,200,000 members. Member congregations of the Synod operate elementary schools and daycare centers throughout the United States, including in the State of Missouri, and as a group they operate the largest Protestant parochial school system in America.

In the decision below, the Eighth Circuit adopted an erroneous, expansive interpretation of this

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner is a member of The Lutheran Church—Missouri Synod but made no such monetary contribution. Pursuant to Supreme Court Rule 37.2, counsel for *amici curiae* states that counsel for petitioner and respondent received timely notice of intent to file this brief. All parties have consented in writing to the filing of this brief.

Court's decision in *Locke* v. *Davey*, 540 U.S. 712 (2004), holding that Missouri did not violate the Free Exercise or Equal Protection Clauses when it excluded a daycare center from a playground-resurfacing grant program solely because the daycare was affiliated with a church. *See* Pet. App. 1a-22a. The rule adopted by the Eighth Circuit—and numerous other courts, *see, e.g.*, *Taxpayers for Pub. Educ.* v. *Douglas Cty. Sch. Dist.*, 351 P.3d 461, 475 (Colo. 2015), *petitions for cert. filed*, Nos. 15-556, 15-557, 15-558 (Oct. 27-28, 2015)—threatens to marginalize religious schools, churches, and other faith-based entities from public life in the United States by licensing religious discrimination against them in the administration of public benefits.

Believing firmly in the Constitution's guarantee of the free exercise of religion and in America's long tradition of affirming religious participation in the public square, *amici* urge this Court to grant certiorari to overturn the erroneous rule of law adopted below and confirm that *Locke*'s narrow, historically driven holding allowing a State to avoid public funding of the clergy does not repudiate this Court's numerous precedents teaching that the Constitution prohibits discriminating against religious groups that are otherwise eligible for public benefits.

SUMMARY OF ARGUMENT

The Free Exercise and Equal Protection Clauses of the U.S. Constitution prohibit government from discriminating against religion, including in the provision of public benefits. *See, e.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995); *Church of Lukumi Babalu Aye, Inc.* v. *Hiale-*

ah, 508 U.S. 520, 532 (1993); *McDaniel* v. *Paty*, 435 U.S. 618 (1978); *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16 (1947). In *Locke* v. *Davey*, 540 U.S. 712 (2004), this Court added a narrow qualification to that nondiscrimination principle by holding that the State of Washington did not violate the Free Exercise Clause when it applied a state constitutional prohibition against funding religious instruction to bar students from using public scholarship funds to pursue degrees in devotional theology. The Court rooted its decision in the State's historical practice of avoiding the use of public funds for clerical training. As the majority explained and the principal dissent agreed, "the only interest at issue" was "the State's interest in not funding the religious training of clergy." *Id.* at 722 n.5; *accord id.* at 734 (Scalia, J. dissenting).

Lower courts, however, have diverged over the breadth of the *Locke* exception to the general principle of nondiscrimination. While some courts have correctly recognized that *Locke* must be construed narrowly in light of this Court's other free-exercise and equal-protection precedents, *see, e.g.*, *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1254-56 (10th Cir. 2008), other courts have improperly extended *Locke* into areas far removed from vocational religious training, using it to justify sweeping exclusions of religion from government benefits programs, *see Bowman* v. *United States*, 564 F.3d 765, 767-69 (6th Cir. 2008), *cert. denied*, 558 U.S. 815 (2009); *see also* Pet. App. 1a-22a, and other public programs, *see Ass'n of Christian Schs. Int'l* v. *Stearns*, 362 F. App'x 640, 646 (9th Cir.), *cert. denied*, 562 U.S. 975 (2010); *see also Bronx Household of Faith* v. *Bd. of Educ.*, 750 F.3d 184, 187-88 (2d Cir. 2014), *cert. denied*, 135

S. Ct. 1730 (2015). Certiorari is warranted to resolve this conflict by rejecting these expansive readings of *Locke* as plainly contrary to the Free Exercise and Equal Protection Clauses' command of nondiscrimination.

Absent review by this Court, lower courts' conflicting interpretations of *Locke* will jeopardize many religious entities' ability to participate on equal terms in hundreds of generally accessible state and local programs across the country. Like their secular counterparts, religious organizations are frequently eligible for direct or indirect aid from neutral government programs supporting activities that benefit the public. These programs provide, for example, educational vouchers and scholarships for primary- and secondary-school education at private schools; textbook and transportation subsidies; scholarship tax credits; grants for construction projects; funding for rehabilitation centers; and grants for resurfacing playgrounds with recycled tire rubber. Yet under the expansive reading of *Locke* adopted by the decision below, religious institutions could be excluded not only from these programs, but also from receiving basic public support—such as fire protection and sidewalk maintenance—solely on account of their religious practices. Certiorari is warranted to prevent governments from engaging in active hostility to religion and leveraging the weight of the administrative state against religious conviction.

ARGUMENT

The First Amendment "commands" that government "cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot ex-

clude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16 (1947).

In *Locke* v. *Davey*, 540 U.S. 712 (2004), this Court held that *Everson*'s nondiscrimination principle did not require the State of Washington to fund the devotional training of clergy. Relying on the historical pedigree of state laws against funding that "essentially religious endeavor" and the specifics of the Washington scholarship program, the Court upheld the program "as currently operated." *Id.* at 721-25.

The Eighth Circuit's decision below dramatically expands *Locke*'s narrow holding, transforming it into a license for religious discrimination in the administration of public benefits that have nothing to do with religious activity. This unwarranted extension of *Locke* is hardly unique, however: Courts across the country have mistakenly relied on *Locke* to uphold burdensome exclusions of religious persons and institutions from a growing variety of public programs. "[A]s the modern administrative state expands . . . and redirects [citizens'] financial choices through programs of its own," this trend threatens to turn *Locke* into a First Amendment cudgel for imposing a regime of "latent hostility to religion" by preventing all manner of religious actors from participating in the ever-expanding number of generally available public benefits programs. *Cty. of Allegheny* v. *ACLU*, 492 U.S. 573, 657-58 (1989) (opinion of Kennedy, J.). This Court should grant certiorari to

lay to rest the view that *Locke*—contrary to every other relevant decision of this Court—permits States to exclude people of faith, solely on the basis of their religion, from neutral public aid programs for which they otherwise qualify.

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE LOWER COURTS HAVE ERRONEOUSLY TRANSFORMED *LOCKE* INTO A LICENSE FOR RELIGIOUS DISCRIMINATION IN THE PROVISION OF PUBLIC BENEFITS.

Since *Locke*, the free-exercise and equal-protection rights of religious Americans have become increasingly defined by geography rather than constitutional principle. By extending *Locke*'s narrow holding beyond its original context—funding the devotional training of clergy—numerous lower courts have granted States essentially "unfettered discretion to exclude the religious from generally available public benefits." Pet. App. 26a (Gruender, J., concurring in part and dissenting in part). That expansion of *Locke* cannot be reconciled with this Court's free-exercise and equal-protection precedents and warrants review.

A. This Court Has Repeatedly Confirmed That The First Amendment Does Not Permit Discrimination Against Religion In The Provision Of Public Benefits.

When the government "discriminates against some or all religious beliefs," this Court has consistently recognized that "the protections of the Free Exercise Clause pertain." *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 532 (1993); *see also, e.g.*, *McDaniel* v. *Paty*, 435 U.S. 618 (1978) (inval-

idating state law that disqualified clergy from participation in state constitutional convention due to antiestablishment concerns). Just as the Establishment Clause guards against excessive government entanglement with religion, the Free Exercise Clause bars the government from adopting "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring). Laws burdening religious practice that are not neutral and generally applicable are therefore subject to "the most rigorous of scrutiny." *Church of Lukumi*, 508 U.S. at 546; *accord id.* at 531-33, 543.

In particular, this Court has consistently maintained that a government violates the Free Exercise Clause's "guarantee of neutrality" when it refuses to provide generally available public "benefits" to religious entities. *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995); *see Roemer* v. *Bd. of Pub. Works*, 426 U.S. 736, 746-47 (1976) ("Neutrality is what is required."). No person may be "compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas* v. *Review Bd.*, 450 U.S. 707, 716 (1981); *see also, e.g.*, *Van Orden* v. *Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) ("The Court has made clear" that government "must 'work deterrence of no religious belief.'" (quoting *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring))). Instead, the Constitution enables all people, regardless of creed, to insist on evenhanded treatment from government in the provision of public benefits. *See Everson*, 330 U.S. at 18 ("State power

is no more to be used so as to handicap religions, than it is to favor them.").

B. *Locke*'s Holding Is Rooted In A Specific, Well-Established, Historic Practice Of Avoiding Public Funding Of The Devotional Training Of Clergy.

In *Locke*, this Court recognized a narrow, historically rooted, fact-dependent qualification to the First Amendment's general requirement of nondiscrimination in the administration of public benefits. The Court held that the State of Washington did not violate the Free Exercise Clause by excluding students pursuing degrees in devotional theology from an otherwise neutral public scholarship program. *See* 540 U.S. at 715. The Court relied on several related factors in making this determination, including the relative mildness of the State's exclusion of religion, *see id.* at 720-21; the absence of evidence that the State's policy reflected animus or hostility toward religion, *id.* at 721, 725; the scholarship program's effort to "go[] a long way toward including religion in its benefits," *id.* at 724; and especially the Nation's history of resisting public funding of the clergy, *see id.* at 722-23. Justice Scalia dissented, taking a different view of the application of the historical record to the facts and arguing that the Court's decision could not be reconciled with precedent holding that facial religious discrimination invites the strictest scrutiny, *see id.* at 726-28 & n.1 (Scalia, J., dissenting) (citing *Church of Lukumi*, 508 U.S. 520).

Although *Locke* diverged from the general rule that States may not discriminate against religion in the provision of public benefits, *see supra* Section I-A,

the Court made clear that it was carving out only a limited exception to that rule. The *Locke* majority emphasized that "the only interest at issue here is the State's interest in not funding the religious training of clergy," 540 U.S. at 722 n.5; *see id.* at 722-23, and it acknowledged the narrowness of the decision at the conclusion of its opinion, stating, "We need not venture further into this difficult area in order to uphold the [scholarship program] as currently operated by the State of Washington," *id.* at 725. The principal dissent likewise agreed that Locke's holding was "limited to training the clergy." *Id.* at 734 (Scalia, J., dissenting). Nowhere in *Locke* did the Court purport to overrule or abrogate its numerous holdings forbidding discrimination on the basis of religion in the administration of generally available public programs.

Accordingly, various courts and commentators have correctly recognized that *Locke* was (necessarily) decided narrowly. In *Colorado Christian University* v. *Weaver*, for example, the Tenth Circuit rejected the argument that "*Locke* subjects all 'state decisions about funding religious education' to no more than 'rational basis review.'" 534 F.3d 1245, 1254-55 (2008) (McConnell, J.). Professor Laycock has similarly argued for a limited reading of *Locke*. *See* Douglas Laycock, *A Syllabus of Errors*, 105 Mich. L. Rev. 1169, 1184 (2007) (book review) (repudiating the argument that, under *Church of Lukumi* and *Locke*, "the Free Exercise Clause requires strict scrutiny only where the claimant proves governmental hostility or animus toward religion" (internal quotation marks omitted)). And other commentators agree that by "going no further than absolutely necessary

to reach its conclusion," the *Locke* Court "decided the case almost entirely on the ministry-funding theory and gave no indication of a willingness to extend its holding to other categories of discrimination." Susanna Dokupil, *Function Follows Form:* Locke v. Davey*'s Unnecessary Parsing*, 3 Cato Sup. Ct. Rev. 327, 353-54 (2004).

C. Some Lower Courts Have Improperly Extended *Locke* In A Manner Contrary To This Court's Free-Exercise And Equal-Protection Precedents.

Not all courts have appreciated the narrowness of *Locke*'s holding and reasoning, however. Indeed, numerous courts have erroneously extended *Locke* to eviscerate the nondiscrimination rule that prevails in this Court's free-exercise and equal-protection jurisprudence.

In the decision below, for example, the Eighth Circuit dramatically expanded the reach of *Locke* to approve the exclusion of a daycare center from a public grant program solely on the basis of its affiliation with a church. Pet. App. 10a-12a. After being denied a grant of public funds to finance the resurfacing of a playground on church property with recycled tire material, the church sued the director of the Missouri Department of Natural Resources, alleging violations of its First Amendment and equal-protection rights. *See* Pet. App. 6a. In rejecting the church's claims, the Eighth Circuit acknowledged that there is "active academic and judicial debate about the breadth" of *Locke*'s holding, Pet. App. 10a, and ultimately took the sweeping view that States have broad discretion under *Locke* to refuse to spend

any "public funds to aid a church," Pet. App. 12a n.3—even though the funds were earmarked for purchasing recycled tire material and thus "separate" and "indisputably marked off" from any religious function, *Everson*, 330 U.S. at 18; *see* Pet. App. 2a-3a.[2]

As petitioner explains, the decision below is the latest development in a sharp and growing conflict among the lower courts on the question whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the State has no valid Establishment Clause concern. *See* Pet. 14-20. But the lower courts' misapplication of *Locke* extends beyond the significant division of authority identified by petitioner: In a diverse array of contexts, federal and state courts have seized upon *Locke* to uphold laws and regulations isolating religion for negative treatment.

1. Numerous cases confirm that lower courts have construed *Locke* with little regard for that deci-

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[2] The Court of Appeals also relied heavily on *Luetkemeyer* v. *Kaufmann*, 419 U.S. 888 (1974), in which this Court summarily affirmed a district court's ruling that Missouri did not violate the Free Exercise or Equal Protection Clauses by refusing to bus private-school students. *See* Pet. App. 7a-9a, 11a. As petitioner notes, Pet. 10 n.2, *Luetkemeyer* is inapposite: In that case, all private-school students were excluded from the busing program, whereas petitioner was excluded from Missouri's scrap-tire program solely because of its religious affiliation. The decision below states that *Luetkemeyer* establishes that the provision of the Missouri Constitution cited to deny petitioner's grant application is "not *facially* invalid," Pet. App. 8a (emphasis altered), but petitioner is not bringing a facial challenge, *see* Pet. 9-10.

sion's necessarily narrow scope and historical, fact-intensive reasoning. These cases' invocations of *Locke* indicate that *Locke* has wrongly been interpreted as wholly supplanting the nondiscrimination requirement established in this Court's precedents, and as squarely controlling all public-benefits free-exercise claims.

In *Bowman* v. *United States*, for example, an Air Force veteran sought credit toward retirement benefits from the Department of Defense for several years of community service he performed with an Ohio church. 564 F.3d 765, 767-69 (6th Cir. 2008), *cert. denied*, 558 U.S. 815 (2009). The Sixth Circuit held that the Government did not violate Bowman's free-exercise or equal-protection rights by denying him credit pursuant to a regulation that provides credit for community service for nonprofit organizations—including teaching at schools—but excepts certain religious forms of community service, such as teaching a church youth group. *See id.* at 770, 774; *see also* 32 C.F.R. § 77.3(a), (d)(1)-(2), (12). Citing *Locke*, the court reasoned that because the government had not directly *prohibited* Bowman from practicing his religion, the fact that he had been denied a critically important public benefit on the basis of his religious activity was immaterial. *See Bowman*, 564 F.3d at 774.

In *Association of Christian Schools International* v. *Stearns*, the Ninth Circuit concluded that, under *Locke*, the University of California did not violate the Free Exercise Clause by disqualifying certain religious high-school courses for purposes of students' eligibility for admission, even though the university frequently approved comparable courses offered by

secular schools. 362 F. App'x 640, 646 (9th Cir.), *cert. denied*, 562 U.S. 975 (2010); *see also Ass'n of Christian Schs. Int'l* v. *Stearns*, 679 F. Supp. 2d 1083, 1090 (C.D. Cal. 2008). The court asserted that, because the case concerned a "civil regulation" as opposed to a "criminal prohibition," it was controlled by *Locke* instead of *Church of Lukumi*, *Ass'n of Christian Schs.*, 362 F. App'x at 646, even though this Court has never attached significance to that distinction in its free-exercise jurisprudence.

And just last year, in *Bronx Household of Faith* v. *Board of Education*, the Second Circuit approved a New York City regulation prohibiting the use of public-school facilities for religious services outside of school hours. 750 F.3d 184, 187-88 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1730 (2015). Over a dissent by Judge Walker, the court held that *Locke* compelled approval of this facially discriminatory regulation—not because of any identified historical exception to the general principle of nondiscrimination, but because both cases ostensibly involved refusals to "subsidize" religion that imposed only "minor" burdens on religion. *Id.* at 194-95.

Lower courts' improper expansions of *Locke*'s holding have not stopped there. In *Liberty University, Inc.* v. *Geithner*, a district court held that *Locke* had "significantly softened the facial neutrality rule of *Lukumi*" en route to upholding the Affordable Care Act's individual and employer mandates against a free-exercise challenge. 753 F. Supp. 2d 611, 642 (W.D. Va. 2010), *aff'd*, 733 F.3d 72, 99 (4th Cir. 2013) (affirming the district court's free-exercise holding without discussing *Locke*).

Several state appellate courts have also construed *Locke* to validate wide-ranging discrimination against religion in the provision of government benefits, in direct conflict with this Court's other free-exercise and equal-protection precedents. Florida state courts, for example, have liberally cited *Locke* in upholding discrimination against religion pursuant to the state constitution's "no-aid" provision. *See Council for Secular Humanism, Inc.* v. *McNeil*, 44 So. 3d 112, 121 (Fla. Dist. Ct. App. 2010) (upholding "bar [on] religious entities from participating in state contracting" for post-release transitional-housing-program services for prison inmates); *Bush* v. *Holmes*, 886 So. 2d 340, 363-66 (Fla. Dist. Ct. App. 2004) (upholding invalidation of a school voucher program as to sectarian schools), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006). The Maine Supreme Judicial Court similarly upheld a state statute banning the use of public funds for sectarian-school tuition. *Anderson* v. *Town of Durham*, 895 A.2d 944, 958-59 (Me.), *cert. denied*, 549 U.S. 1051 (2006). And the Kentucky Supreme Court relied exclusively on *Locke* to reject a free-exercise challenge to the withholding of public funding for the construction of a pharmacy-school building on the campus of a private Baptist college. *See, e.g., Univ. of Cumberlands* v. *Pennybacker*, 308 S.W.3d 668, 679-81 (Ky. 2010).

2. Each of these decisions extends *Locke* beyond—sometimes far beyond—its original bounds. In doing so, they also distort *Locke* by selectively applying and emphasizing (or de-emphasizing) the factors the *Locke* Court considered in its analysis. For example, the district-court opinion approved by the Ninth Circuit in *Association of Christian Schools*

misreads *Locke* to "*require* an element of animus" for free exercise claims relating to government regulations burdening religion, 679 F. Supp. 2d at 1103 (emphasis added), even though *Locke* considered the government's apparent intent only as one factor in its analysis, *see* 540 U.S. at 724; *see also Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) (holding that a police department's mere differential treatment of secular and religious objections to the department's "no beard" policy was "sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny"); Laycock, *supra*, at 1184 (explaining that neither *Church of Lukumi* nor *Locke* conditions strict scrutiny on proof of hostility or animus).

Along the same lines, the Sixth Circuit in *Bowman* rested its rejection of the veteran's free-exercise and equal-protection claims largely on the supposed lightness of the burden imposed on his religious exercise. *See* 564 F.3d at 774-75. *But see, e.g.*, *Williams* v. *Morton*, 343 F.3d 212, 217 (3d Cir. 2003) (stating that "[t]here is no support for th[e] assertion" that a free-exercise claimant must show that a challenged policy "'substantially burdens' his or her religious beliefs" to prevail); Andy G. Olree, *The Continuing Threshold Test for Free Exercise Claims*, 17 Wm. & Mary Bill Rts. J. 103, 143 (2008) (explaining that *Locke* considered several factors in rejecting the free-exercise claim and did not base its decision solely on a finding that the burden on religion was insubstantial).

The district court's decision in *Liberty University*, moreover, reads *Locke* as "significantly soften[ing]" *Church of Lukumi*'s requirement of "facial neutrali-

ty" in laws implicating religious practice. 753 F. Supp. 2d at 642. The district court reached this conclusion even though nothing in *Locke* purports to undermine *Church of Lukumi*'s strict-scrutiny analysis for laws that discriminate against religion. *See supra* Section I-B.

Perhaps most importantly, hardly any of these decisions make an effort to show that a religious exclusion is historically rooted in a specific public policy, like the American tradition against public funding of the clergy discussed at length in *Locke*. *See* 540 U.S. at 722-23.

This Court should grant certiorari to correct these erroneous expansions of *Locke* and make clear that *Locke*'s holding is necessarily limited by other precedent forbidding discrimination against religion—and certainly does not permit the government to deny publicly available benefits to otherwise eligible persons or groups simply because they are religious. *Cf. Schempp*, 374 U.S. at 225 ("[T]he State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'").

II. THE INCORRECT APPLICATION OF *LOCKE* BY LOWER COURTS THREATENS NUMEROUS EXISTING BENEFITS PROGRAMS.

The Eighth Circuit's sweeping misinterpretation of *Locke* implicates an alarming number of public aid programs, including: vouchers and scholarships for schools; subsidies for textbooks and school transportation; tax credits for scholarships; grants for construction projects; funding for rehabilitation centers;

and subsidies for resurfacing playgrounds with rubber made from recycled tire scrap, like the Missouri program at issue here. Religious institutions, of course, operate many organizations that satisfy the neutral requirements for receiving public aid established by these generally available programs.

But the rule adopted by the Eighth Circuit licenses governments to withhold these benefits (and many others) from otherwise eligible organizations based solely on the religiosity of their operators. Particularly in the modern age, that result evinces at least latent hostility against religion, not neutrality toward it: "[A]s the modern administrative state expands to touch the lives of its citizens" in "diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality." *Cty. of Allegheny*, 492 U.S. at 657-58 (opinion of Kennedy, J.). Certiorari is warranted to prevent the ghettoization of religious organizations from the public square.

A. Vouchers and Scholarships. At least thirteen States offer vouchers or scholarships to students for use at private schools.[3] Most of these States permit these funds to be used at religious schools. The Establishment Clause does not prohibit these voucher or scholarship programs, *see Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002), but legal chal-

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[3] *See School Voucher Laws: State-by-State Comparison*, Nat'l Conf. of State Legislatures, http://www.ncsl.org/research/education/voucher-law-comparison.aspx (last visited Nov. 17, 2015).

lenges have produced inconsistent rulings regarding whether these programs run afoul of state Blaine Amendments and similar laws—and, if so, whether the First Amendment and Equal Protection Clause prevent that result.

For example, in a case now pending before this Court, the Colorado Supreme Court held that Colorado's Blaine Amendment barred a voucher program that permitted funds to be used at religious schools, citing *Locke* for support of that result. *See Taxpayers for Pub. Educ.* v. *Douglas Cty. Sch. Dist.*, 351 P.3d 461, 471 (Colo. 2015), *petitions for cert. filed*, Nos. 15-556, 15-557, 15-558 (Oct. 27-28, 2015). Vermont reached the same result under the compelled-support clause of the Vermont Constitution, *Chittenden Town Sch. Dist.* v. *Dep't of Educ.*, 738 A.2d 539, 563 (Vt.), *cert. denied* 528 U.S. 1066 (1999), while Indiana took the opposite view, declaring that the voucher program at issue did not violate the State's Blaine Amendment, *Meredith* v. *Pence*, 984 N.E.2d 1213, 1220 (Ind. 2013).

Some States, like Maine, have explicitly *prohibited* scholarships from being used at religious schools. Me. Rev. Stat. tit. 20-A, § 2951(2). Maine courts have determined that this arrangement is constitutional, relying in part on *Locke*. *Anderson*, 895 A.2d at 955-56.

Furthermore, several States—Arizona, Florida, Mississippi, Tennessee, and Nevada—offer Education Savings Account programs that award grants to parents who enroll their students in private schools,

including religious institutions.[4] Nevada's program, for example, provides that parents may withdraw their children from public school and receive grants that can be used to pay for tuition, textbooks, tutoring, or transportation.[5] The decision below, however, would permit these States to discriminate against religion by withholding funds from parents who would like to send their children to religious (as opposed to secular) private schools, further distorting *Locke*'s holding.

B. School Textbooks, Transportation, and Health Services. In lieu of or in addition to school vouchers, many States offer support for textbooks and transportation for students attending private schools. Rhode Island, for example, reportedly provided over $5 million in 2014 in financial support for its longstanding textbook and transportation programs.[6] New York similarly operates a textbook-loan program and transportation program, and these funds are explicitly made available to students attending nonpublic schools that provide religious in-

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[4] Lindsey Burke, *Nevada Becomes Fifth State To Enact Groundbreaking Education Savings Accounts*, Daily Signal (June 2, 2015), http://dailysignal.com/2015/06/02/nevada-becomes-fifth-state-to-enact-groundbreaking-education-savings-accounts/.

[5] Nev. State Treasurer, *Nevada's Education Savings Account Program*, http://www.nevadatreasurer.gov/SchoolChoice/Home/ (last visited Nov. 19, 2015).

[6] *See* Bob Plain, *State Spends $5 Million on Private School Transportation, Textbooks*, RI Future (Apr. 7, 2015), http://www.rifuture.org/state-spends-5-million-on-private-school-transportation-textbooks.html.

struction as part of their curricula.[7] This Court's holdings in *Everson* and *Mueller* v. *Allen*, 463 U.S. 388 (1983), correctly recognize that these programs are permissible under the Establishment Clause.

Additionally, New Hampshire permits school districts to provide health services to all nonpublic-school students requesting such services. *See* Opinion of the Justices, 115 N.H. 553 (1975) (advisory opinion affirming this practice). New York *requires* school districts to provide to students of nonpublic schools the same level of health and welfare services as is available to students of public schools. *See* N.Y. Ed. Law § 912. The rule of law announced below, however, imperils the ability of students at religious schools to continue benefiting from these programs on the same terms as their contemporaries attending secular private schools.

C. Scholarship Tax Credits. States have begun experimenting with programs that grant tax credits to individuals who donate money to nonprofit organizations that, in turn, distribute those funds to students as scholarships. Students may then use those scholarships to attend the school of their choice, including religious schools. At least fourteen States employ such a program,[8] and to date, state courts have declined to invalidate them as violating state Blaine Amendments. *See, e.g.*, *Magee* v. *Boyd*, 175 So. 3d 79, 132-33 (Ala. 2015) (rejecting Blaine

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[7] N.Y. State Educ. Dep't, *Nonpublic Schools*, http://www.p12.nysed.gov/nonpub/ (last updated Nov. 9, 2015).

[8] *See Scholarship Tax Credits*, Nat'l Conf. of State Legislatures, http://www.ncsl.org/research/education/school-choice-scholarship-tax-credits.aspx (last visited Nov. 17, 2015).

Amendment challenge); *Kotterman* v. *Killian*, 972 P.2d 606 (Ariz.) (same), *cert. denied*, 528 U.S. 921 (1999); *see also Ariz. Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125 (2011) (holding that Arizona taxpayers lacked standing to bring Establishment Clause challenge in federal court). Nonetheless, Montana has proposed to implement its recently enacted scholarship tax credit to explicitly exclude religious *schools* (not merely clerical *degrees*) from the program, and the interpretation of *Locke* adopted by the decision below would justify that act of state-sponsored hostility to private religious education.[9]

D. Construction Grants. Many States permit private nonprofit organizations to apply for publicly available construction grants to help build new facilities or renovate existing ones. Maryland, for example, makes funds available to nonpublic schools to update aging buildings.[10] And New Jersey recently awarded $1.3 billion for 176 higher-education construction projects to public and private universities; over 250 applications were reviewed.[11] Two of the

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[9] 19 Mont. Admin. Reg. 1682, 1682-83 (Oct. 15, 2015) (Notice No. 42-2-939); Associated Press, *Public Mulls Exclusion of Religious Schools from Montana Tax Credit*, Billings Gazette (Nov. 5, 2015), http://billingsgazette.com/news/state-and-regional/montana/public-mulls-exclusion-of-religious-schools-from-montana-tax-credit/article_edee80f5-ac36-53ae-85a4-fb3448c54748.html.

[10] *Non-Public Aging School Program Documents*, Md. Pub. Sch. Constr. Program, http://www.pscp.state.md.us/Programs/NonPubASP/nonpubaspindex.cfm (last visited Nov. 25, 2015).

[11] Press Release, N.J., *Governor Christie Announces $1.3 Billion for Higher Education Construction, Putting Thousands to Work and Improving Facilities for 350,000 Students*

recipients, however—the Princeton Theological Seminary and rabbinical school Beth Medrash Govoha—are religious institutions, and their grants have been challenged in New Jersey state court. *See ACLU* v. *Hendricks*, No. A-4399-13 (N.J. Super. Ct. App. Div.). The plaintiffs cite *Locke* for the proposition that federal courts have "repeatedly rejected" the State's argument that "the federal Constitution may prevent states from declining to provide government aid . . . to religious groups."[12] This sweeping argument is of a piece with the decision below, and would improperly limit the schools' free-exercise and equal-protection rights to seek the same grants as similarly situated secular institutions.

E. Rehabilitation Centers. Religious organizations receive aid for more than just schools. For example, many religious organizations run rehabilitation centers and halfway houses and are eligible to receive generally available state funds on the same terms as their secular counterparts. One Florida law, for example, specifically requires the Department of Corrections to "make every effort to consider qualified faith-based service groups *on an equal basis* with other private organizations" when selecting "contract providers to administer substance abuse treatment programs" to Florida inmates. Fla. Stat. § 944.473(2)(c) (emphasis added). But pending litigation in Florida would bar faith-based rehabilita-

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(Apr. 29, 2013), http://nj.gov/governor/news/news/552013/approved/20130429i.html.

[12] Reply Brief at 26 & n.11, *ACLU* v. *Hendricks*, No. A-4399-13 (N.J. Super. Ct. App. Div. July 17, 2015), *available at* https://www.aclu-nj.org/download_file/view_inline/1695/1000/.

tion groups from receiving public funds to support their substance-abuse rehabilitation centers. *Council for Secular Humanism, Inc.* v. *McNeil*, No. 1D08-4713 (Fla. Dist. Ct. App.). In a preliminary ruling, the state court relied on *Locke* in stating that "the United States Supreme Court has recognized that a state constitutional provision, like Florida's no-aid provision, can bar state financial aid to religious institutions without violating either the Establishment Clause or Free Exercise Clause." *Council for Secular Humanism, Inc.* v. *McNeil*, 44 So. 3d 112, 121 (Fla. Dist. Ct. App. 2010). The broad misinterpretation of *Locke* adopted below and by other courts would deprive these organizations of otherwise available contract funds solely because their motivation to serve stems from religious convictions.

F. Scrap Tire Programs. Finally, the rule enforced by the Eighth Circuit and other lower courts would affect other programs similar to the one at issue in this case. Nebraska, for example, has awarded funds to religious schools for playground-surface improvement pursuant to its own scrap-tire program.[13] Kentucky and Kansas likewise have provided public funds to religious schools to replace playground surfaces.[14] And all three States have consti-

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[13] Press Release, Neb. Dep't of Envtl. Quality, *More Than $2 Million Awarded for Tire Collection, Recycling Projects* (June 12, 2015), http://deq.ne.gov/Press.nsf/pages/PR061215.

[14] Div. of Waste Mgmt., Ky. Dep't for Envtl. Prot., *Waste Tire Program* (2014), *available at* http://waste.ky.gov/Waste%20Tire%20Program%20Report/Waste%20Tire%20Report%202014%201-15-15-FINAL.pdf; *Waste Reduction, Public Education, & Grants*, Kan. Dep't of Health & Env't, http://www

tutional provisions that, under the decision below, could be cited as a basis for excluding religious schools from these socially beneficial programs based solely on the schools' religious nature. Neb. Const. art. VII, § 11; Ky. Const. § 184; Kan. Const. art. 6, § 6(c).

* * *

This discussion provides only a sampling of the areas in which the Eighth Circuit's interpretation of *Locke* would justify blatant religious discrimination. Under the erroneous interpretations of *Locke* adopted below and by numerous other courts, the government could at any time "cu[t] off" "such general government services as ordinary police and fire protection, connections for sewage disposal, [or] public highways and sidewalks," asserting that such a decision is merely a permissible refusal to subsidize religion under the First Amendment and Equal Protection Clause. *Everson*, 330 U.S. at 17-18.

"But such is obviously not the purpose of the First Amendment." *Everson*, 330 U.S. at 18; *see Roemer* v. *Bd. of Pub. Works*, 426 U.S. 736, 747 (1976) (opinion of Blackmun, J.) ("Th[is] Court never has held that religious activities must be discriminated against in this way."). Particularly in an age when the government is "expand[ing] to touch the lives of its citizens in . . . diverse ways and redirect[ing] their financial choices through programs of its own," it is pure "fiction" to believe "that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality."

.kdheks.gov/waste/about_grants.html (last visited Dec. 3, 2015) (providing lists of grant recipients).

Cty. of Allegheny, 492 U.S. at 657-58 (opinion of Kennedy, J.).

This Court should grant certiorari to correct the Eighth Circuit's erroneous reading of *Locke* by reaffirming that neither *Locke* nor any other decision of this Court broadly licenses the government to discriminate against otherwise eligible religious groups in the provision of generally available public benefits, and that lower court rulings declaring otherwise contravene this Court's precedent.

CONCLUSION

This Court's review is warranted to correct the Eighth Circuit's improper expansion of *Locke* v. *Davey*, 540 U.S. 712 (2004), from a narrow decision tied to the historical aversion to funding religious training for clergy, into a sweeping license to deny generally available public benefits to religious groups solely on the basis of their religious affiliation.

Respectfully submitted.

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RECORD AND BRIEF

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In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* ETHICS & RELIGIOUS LIBERTY COMMISSION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Ethics & Religious Liberty Commission ("ERLC") is the public policy and engagement arm of the Southern Baptist Convention. With more than 15 million members and over 46,000 churches nationwide the Southern Baptist Convention is America's largest Protestant denomination. The ERLC is charged with addressing public policy affecting such issues as freedom of speech, religious liberty, marriage and family, the sanctity of human life, and ethics.

Religious freedom is an indispensable, bedrock value for Southern Baptists. The ERLC engages culture with the gospel of Jesus Christ by speaking in the public square for the protection of religious liberty and human flourishing. The correlated guarantee of freedom from government interference in matters of faith protects church members by fostering a society where religious adherents from all faiths may follow the dictates of their conscience in the exercise of religion.

The thousands of churches represented by the ERLC have an interest in not being discriminated against in government aid programs, like the

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici and their counsel, make a monetary contribution to the preparation or submission of this brief. The parties consented to this filing. Their letters of consent are on file with the Clerk. As required by Rule 37.2(a), counsel for amici curiae provided timely notice of the intent to file this brief to all parties' counsel of record.

playground resurfacing program in Missouri at issue in this case. For the same reasons Trinity Lutheran Church of Columbia was prevented from receiving a government grant, any given Southern Baptist congregation could likewise be prevented from participating in government programs purely on the basis of religion. The ERLC brings a unique perspective on the impact of religious liberty decisions throughout the nation.

SUMMARY OF ARGUMENT

Americans are appropriately apprehensive about the government becoming entangled with religion. Many challenging cases attempt to draw the line between permissive government support of religion and prohibited establishment of religion. This is not hard case, however. Missouri has a grant program to resurface playgrounds using recycled tires. The State excluded Trinity Lutheran's otherwise meritorious application purely because it was a church. Yet nobody fears an established church by means of a recycled tire surface on a playground.

Churches and religious citizens ought not be discriminated against, as has happened in this case and a growing number of related cases where this Court's narrow decision in *Locke v. Davey*, 540 U.S. 712 (2004) has been expanded into a shield for discrimination against religion under the guise of "play in the joints" between the Free Exercise and Establishment Clauses. This is just such a case. The Eighth Circuit allowed Missouri to discriminate against a church because a facially discriminatory provision of its constitution states that "no money shall ever be taken from the public treasury, directly

or indirectly, in aid of any church ...." Mo. Const. art. 1, § 7. That categorical exclusion of religious actors survived scrutiny under the U.S. Constitution because it fell within the "play in the joints" between the Free Exercise Clause and Establishment Clause. *Locke*, 540 U.S. at 720. Whatever play exists, however, cannot foster discrimination against religion. Contrary to the Eighth Circuit's holding below, the better reading of *Locke* is that it does not endorse such acts of overt discrimination on the basis of religion, but instead allows for religion to participate in civic life on equal terms with non-religion, so long as there is no legitimate Establishment Clause concern.

The ERLC is concerned not only with the unjustified treatment of Trinity Lutheran Church in this case but also with the overall trend of churches and religious actors being excluded from participating in government programs. This disturbing trend is not only a correctable misapplication of *Locke*, but a violation of the Free Exercise, Establishment, and Equal Protection Clauses, which protect religion from being treated with hostility. The Court should grant Trinity Lutheran Church's certiorari petition.

ARGUMENT

I. Churches should be allowed to participate in government programs on equal footing with other civic organizations.

America has always enjoyed the presence of churches in civic life. Our nation was founded with the prevalent belief that religion provides a moral foundation necessary for successful republican self-

government. The mediating role of churches in society is no less valuable today than at the birth of the American experiment in self-government.

A. Religious pluralism allows church participation in civic life without establishing religion.

The commitment to religious liberty as enshrined in the First Amendment provides freedom to every church to pursue its own spiritual ends. Those ends frequently include valuable contributions to the community, including social services, education, and other acts of mutual aid and benevolence to citizens in need. To so operate, churches must be free from undue interference from civic powers to pursue ministry in its many forms.

The uniquely American experience with religious pluralism and the protection of free exercise of religion means most churches do not want government-sponsored or government-established religion. Government-sponsored religion interferes with a church's ability to live out a religious faith free from government meddling.

Religious views, along with any other sincere views, must be welcomed on equal terms in civil society. Indeed, "the pluralist model is based on the accommodation position ... government accommodation of all people's rights to express, or refrain from expressing, religious convictions and religious beliefs." Richard Land, *The Divided States of America* 76 (2011). Embracing a pluralistic society with many competing religious faiths will mean "no one is penalized for his or her views; neither those

with religiously informed moral values, nor those with religion-free convictions." *Id.* at 174.

America has long valued the equal right of citizens, including religious citizens with competing views, to participate in civil society on the same footing. In James Madison's 1785 *Memorial and Remonstrance Against Religious Assessments*, the influential Founding Father opposed a bill to provide for established government religious teachers on two grounds. First, he opposed it on the basis of conscience because the "religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." Second, he opposed it on the grounds of equality as "the Bill violates that equality which ought to be the basis of every law ... all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights."[2]

As this Court put it more recently, "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, 505 U.S. 577, 589 (1992). Indeed, the "design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." *Id.*

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[2]Available at http://founders.archives.gov/documents/Madison/01-08-02-0163

The freedom of the religious sphere to operate without government coercion does not, however, necessitate a clinically secular state where religious actors are kept from public life. Government can, and should, accommodate religiously-neutral actors in government programs, allowing participation on an equal basis for religious and non-religious constituents.

Just as police and fire service responds to calls from churches and stores alike, government programs can allow religious applicants to participate in government programs irrespective of their religious nature without undermining the appropriate level of distance between church and state. More passive government services, such as road signs naming a church or school, likewise serve religious and non-religious on the same basis.

The alternative, excluding church and religion from otherwise neutral government programs, would not fulfill the "benevolent neutrality" the Court has long embraced whereby "State power is no more to be used so as to handicap religions, than it is to favor them." *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 669 (1970) (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). A broad exclusion of religion is not neutral, let alone benevolent.

Society writ large benefits when churches and religious actors are accommodated and encouraged to participate in public life. Churches bring a number of positive benefits to communities that would be diminished if the courts embrace a legal position permitting discrimination against religious actors in government programs. Just a few of the benefits to

society from healthy and vibrant churches include local economic development, social services for the poor and vulnerable, community educational programs, and civic engagement.

B. There are an increasing number of government programs that should be open to church participation.

There are ample opportunities for churches or affiliated religious institutions to participate in government programs. From the charitable choice provision in the Welfare Reform Bill of 1996 where states were required to include religious organizations as eligible contractors for social services, 15 U.S.C. § 604a, to the creation of the Office of Faith-Based and Community Initiatives by President Bush in 2001, Exec. Order No. 13,199, 66 FR 8499 (January 31, 2001), there are more opportunities than ever before for the government to accept churches and religious actors as equal participants in social programs.

The opportunity for churches to participate alongside others in government programs should not be mistaken for a mandate requiring churches to participate. Many in the religious community, including the Southern Baptist Convention, elect not to participate in government programs at the state or federal level for religious or practical reasons. What is important is that the government treats churches fairly and allows them to choose between participation and non-participation.

The Eighth Circuit's decision in *Trinity Lutheran Church of Columbia v. Pauley*, 788 F.3d 779 (8th Cir. 2015) disrupts the benevolent neutrality and lack of

hostility towards religion protected by the First Amendment. The Missouri state grant program was generally open to applicants and Trinity Lutheran's application would have been approved, the majority decision holds, but for the fact it was a church. This is discrimination against a church purely on account of it being a church.

In addition to needlessly diminishing the ability of churches to participate in civic life, the result below misapplies this Court's precedent by permitting the government to expressly exclude churches because they are churches, which is the sort of hostility towards religion the Court has often warned against. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 85(1985) (Burger, C.J., dissenting) ("For decades our opinions have stated that hostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion.").

The Ethics & Religious Liberty Commission defends the right of churches throughout the country to enjoy religious freedom. It is concerned that this Court's Religion Clause precedent is being misunderstood and misapplied by lower courts to sanction discrimination against churches.

II. Lower courts are expanding *Locke v. Davey* to permit discrimination against churches well beyond any Establishment Clause concerns.

Little more than a decade ago, this Court faced a challenge to the State of Washington's exclusion on "funding the religious training of the clergy." *Locke*, 540 U.S. at 722 n.5. The Court was careful to limit the

reach of this holding so as to preclude the case from being misunderstood as a justification for discrimination against religion generally. *Locke* has been rapidly misconstrued by lower courts, including the Eighth Circuit by a divided vote here, as a justification for raw discrimination against churches, even in areas far afield from the traditional concerns of the Establishment Clause. As lower courts continue to misread and misunderstand *Locke*, the cherished rights of churches and religious adherents to be free from discrimination at the hands of the government are imperiled.

A. *Locke v. Davey* has been misunderstood and misapplied by the Eighth Circuit as a basis for tolerating discrimination against churches.

The *Trinity Lutheran* panel only timidly relied on *Locke*, noting the "active academic and judicial debate about the breadth of the decision." 788 F.3d at 785. The panel's reluctance to follow *Locke* also took the form of speculating that the Supreme Court "seems to be going" in a different direction, but "[i]n our view, only the Supreme Court can make that leap." *Id.*

In the end, the panel moved past its concerns with *Locke's* future and concluded the daycare run by Trinity Lutheran Church could be categorically excluded from a government program providing grants for playground resurfacing. The exclusion followed the Missouri Constitution's prohibition on government funding either directly or indirectly to a church, which the Eighth Circuit held "does not conflict with the First Amendment or the Equal

Protection Clause of the United States Constitution." *Id.*

If allowed to stand, such an endorsement of discrimination against religious groups based purely on religion (not on Establishment Clause considerations) will only increase the number of courts countenancing discrimination against religion in the name of *Locke*. Judge Gruender in his dissent from the *Trinity Lutheran* panel has it right; following the Tenth Circuit's understanding of *Locke*, in the absence of any Establishment Clause concerns like the targeted funding of devotional theology in Washington, "the Department's 'latitude to discriminate against religion ... does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support.' " *Id.* at 794 (quoting *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008).

Locke, after all, involved a carefully cabined exclusion of students receiving scholarships to study devotional theology. The Court emphasized the limited nature of the scholarship exclusion, as students could still use scholarships to attend religious schools, or even study theology at religious schools. 540 U.S. at 724–25. In short, the Washington exclusion was carefully crafted to avoid the state funding clergy. The funding of clergy, unlike grants for pour-in-rubber playground surfaces, has raised the specter of established religion dating back to the time of the founding. James Madison's *Memorial and Remonstrance* in 1785, *supra* part I, was a response to a bill proposing state funding of clergy. Likewise, government funding of clergy was a core component

of the established church in England that the First Amendment was designed to avoid. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2152 (2003) (discussing public taxation support for ministers as an element of establishment).

The panel's reading of *Locke* steps well beyond the historically rooted concerns about established religion. The Constitution protects churches and religious citizens not only from the threat of an established religion, but also from governmental discrimination against religion.

B. *Locke* has been extended well beyond the education funding context.

The concerns of Justice Scalia's dissent in *Locke* have played out, as courts are using *Locke* to "justify the singling out of religion for exclusion from public programs in virtually any context." 540 U.S. at 730 (Scalia, J., dissenting), including, in this case, government grants for resurfacing playgrounds.

The majority of the older cases applying *Locke* have involved government funding of education, as *Locke* itself involved. *See, e.g.*, Petition for Writ of Certiorari, *Douglas Cnty. School Dist. v. Taxpayers for Public Educ.*, No. 15-557 (Oct. 28, 2015). Those cases have been amply highlighted by Trinity Lutheran Church's Petition as well as the briefs in support of the petitioners in *Douglas Cnty*, *id.* The ERLC highlights how the *Locke* precedent has been extended in areas outside education funding in a way that erode a church's ability to participate in many other aspects of civic life. In these cases, far afield

from concerns over religious funding of education, governments have been discriminating against churches or religious citizens in the context of general government grants or programs. If the state can discriminate against a church, purely because it is a church, for a program distributing recycled tires to make playgrounds more safe, where is the limit to the permitted areas of government discrimination? The following cases are examples of the diverse contexts in which this Court's decision in *Locke* has been presented beyond the education funding cases.

1. *Recycled tire grants in* Trinity Lutheran Church of Columbia v. Pauley.

The facts of this case reflect a generally applicable government grant program specific to playgrounds, not education. To this day the Missouri Department of Natural Resources describes the types of eligible applicants without reference to excluding churches.[3] Even so, the Eighth Circuit held the Missouri Constitution prevents the playground scrap tire surface material grants from going to a church-owned daycare playground.

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[3] *See* Missouri Dep't of Natural Resources PUB2425, 12/2014, *Playground Scrap Tire Surface Material Grant Application Instructions for Form 780-2143*, available at http://dnr.mo.gov/pubs/pub2425.htm ("**Who may apply for a playground scrap tire surface material grant?** Public school districts, private schools (depending on status), park districts, nonprofit day care centers, other nonprofit entities and governmental organizations other than state agencies are eligible to submit applications. Privately owned, residential backyard areas, and private in-home day care centers are ineligible.").

2. *Use of government facilities in* Bronx Household of Faith v. Board of Education of City of New York.

New York City Schools in *Bronx Household of Faith* made school facilities generally available outside school hours for use by the community. However, it excluded by rule "worship services," which precluded the Bronx Household of Faith from utilizing an otherwise available school facility on weekends. While the case involved the physical location of a school, the government program at issue was purely one of facility use after hours. The Second Circuit's most recent decision in *Bronx Household of Faith* (the fifth Circuit decision in the litigation) squarely affirmed the government's direct discrimination against the Bronx Household of Faith because of its religion. *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 750 F.3d 184, 190 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1730 (2015).

The first substantive precedent relied upon by the Second Circuit in *Bronx Household of Faith* was *Locke*, which the court interpreted to mean the government could discriminate in access to facilities without violating the Free Exercise Clause because *Locke* allowed the exclusion of certain theology scholarships. *Id.* at 190. The Second Circuit went on to equate funding of clerical education in *Locke* to the facts in front of them because the "Supreme Court has expressly ruled that where motivated by Establishment Clause concerns, a government decision to exclude specified religious causes from eligibility to receive state education subsidies" is constitutional. *Id.* at 193.

The court thus morphed the longstanding Establishment Clause concerns of funding clergy into a general right to exclude religion as the Establishment Clause "disfavor[ing] public funding of religion," even when that public funding was not funding per se, but mere access to government facilities as a subsidy that applicants (including the Bronx Household of Faith) would pay the government to use. As the dissent noted, this is not a subsidy in the normal sense, *id.* at 207 (Walker, J., dissenting) let alone government funding of the type at issue in *Locke*.

3. *Provision of youth residential services in* Teen Ranch v. Udow.

In this case, a faith-based organization provided youth residential services for delinquent, neglected, abused, and emotionally troubled youth under contract with the state. *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 406 (6th Cir. 2007). The Sixth Circuit relied on *Locke* to support excluding Teen Ranch's religious programming without violating the Free Exercise or Equal Protection Clauses. *Id.* at 409–10.

These cases all stand for the proposition that *Locke* is being applied broadly beyond the specific historically-informed context of state funding of clergy. The longer this Court lets the uncertainty and confusion percolate, the more churches and religious adherents will be discriminated against because of religion by being excluded from government aid, such as scholarships, neutral grant programs, as well as the use of government facilities.

C. Churches deserve equal treatment, not exclusion and discrimination.

Churches deserve equal and fair treatment at the hands of the government. This case and the many other cases following *Locke* are not pleading for a special exemption from a law that would otherwise apply. Quite the opposite, these are cases seeking equal treatment for religion in government programs or benefits. Trinity Lutheran Church should have had its application for a playground resurfacing grant evaluated on the same terms as those applications from other playgrounds. It is not special treatment, but mere fairness that is sought.

The Court has frequently endorsed the neutrality towards religion that permits churches and religious adherents to participate on the same terms as others. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs ..."); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947) (the government cannot exclude individuals "because of their faith or lack of it, from receiving benefits of public welfare legislation.").

No less than the Free Exercise Clause, Establishment Clause, and Equal Protection Clause protect the right of Trinity Lutheran and other churches to be participants in public life without being marked for exclusion solely because of religion. It is a mistake to extend *Locke* so far as to undermine the principle of benevolent neutrality that undergirds the balance between the Free Exercise and

Establishment Clauses. This Court should grant certiorari to restate the limits of *Locke* and affirm the rights of churches to be free from express discrimination in violation of the U.S. Constitution.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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AND
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In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA INC.,

PETITIONER,

V.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER URGING THAT A WRIT OF CERTIORARI BE GRANTED

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QUESTION PRESENTED

Whether exclusion of a church-related school from a secular program providing scrap tire for playgrounds violates the First and Fourteenth Amendments to the United States Constitution.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the unalienable right to acknowledge God as the moral foundation of our laws, promoting a return to the historic and original interpretation of the United States Constitution, educating citizens and government officials about the Constitution and the Godly foundation of this country's laws and justice system, and defending the free exercise of religion.

The Foundation has an interest in this case because it believes that the State of Missouri is directly discriminating against a church in violation of the Free Exercise Clause of the First Amendment to the United States Constitution. The Framers of our constitutional system of government rightly

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[1] Pursuant to this Court's rule 37.3, all parties have consented to the filing of this *amicus* brief. Further, pursuant to Rule 37.6, this *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

understood that Church and State are separate entities, each of which has a distinct role in God's economy as well as in our best interest. But these separate entities complement each other; they should not be at odds with one another. By preserving law and order, the State makes it easier for the Church to proclaim religious truth; by teaching religious values and inculcating virtue and good moral character, the Church makes it easier for the State to preserve law and order. When the State singles out churches for discrimination by prohibiting churches from receiving a benefit or participating in a program that is open to other nonprofits, it adopts a stance that is neither benevolent neutrality nor strict neutrality but rather a stance of active and overt hostility toward religion. Such hostility would have been anathema to the Framers of our constitutional system and should be anathema to this Court as well.

SUMMARY OF ARGUMENT

The Framers of our Constitution intended Church and State to be distinct institutions. But did they intend that the State should discriminate against the Church? Did they intend that church schools must compete at a disadvantage with secular schools, even in purely secular aspects like providing safe playgrounds?

Petitioner believes the Framers had no such intention, and *Amicus* agrees.

There is no question that Petitioner Trinity Lutheran Church and its affiliated Learning Center were fully qualified for Missouri's Scrap Tire Program. The State DNR evaluated Trinity and rated it fifth among the applicants for fourteen grants. But then the State DNR wrote to Trinity saying Trinity could not be considered for the Program because Article I Section 7 of the Missouri Constitution prohibits aid to churches.

Article I Section 7 is what is known as a "mini-Blaine amendment." After the narrow defeat in 1875 of Senator James G. Blaine's proposed amendment to the United States Constitition prohibiting aid to churches, numerous states including Missouri adopted similar amendments to their state constitutions. The historical evidence establishes that the Blaine Amendment and at least many of the state mini-Blaine amendments were motivated by strong anti-Catholic sentiment. At the time, immigration to the United States from Roman

Catholic countries was increasing. Many Catholics objected to what appeared to be Protestant content in the American public schools, and they began to establish widespread Catholic schools, and they sought support for their schools because they were paying taxes to support public schools to which they could not send their children. Protestants and other non-Catholics supported the mini-Blaine amendments to stifle Catholic schools and ensure that Catholic schools received no government support.

In the recent cases of *Windsor v. United States,* 570 U.S. ___ (2013), and *Obergefell v. Hodges,* ___ U.S. ___ (2015), this Court held that laws prohibiting same-sex marriage must be invalidated because they were based in part on animus toward homosexuals. Similarly, a state provision forbidding aid to parochial schools must be invalidated if animus toward Roman Catholics is a "substantial" or "motivating" factor in its enactment.

The Eighth Circuit erroneously ruled that the denial of scrap tire funds did not violate Trinity's right to free exercise of religion, and the 8th Circuit therefore evaluated the case using a "rational basis" test. But Trinity was rejected for the program solely because Trinity is a church and Article I Section 7 supposedly forbids their participation. Because Trinity was required to either (1) compromise its religious belief that the Learning Center must be a part of its ministry or (2) forego a substantial state benefit that is available to the general public, this "Hobson's choice" constitutes a free exercise violation. Because Article I Section 7 is clearly aimed at

religion, and because Trinity has asserted a "hybrid" claim of a free exercise, establishment, free speech, and equal protection violation, this case should be evaluated on an strict scrutiny compelling interest / less restrictive means basis.

Article I Section 7 has two clauses; the first prohibits aid to churches, and the second prohibits preference for or discrimination against churches. If the two clauses are interpreted together, a program that aids only the secular aspects of a school and treats the Learning Center on the same basis with all other schools does not violate Article I Section 7. Because this is a reasonable interpretation of Section 7, this Court has a "duty to save" the provision by interpreting it as applied to allow Trinity's participation in the Scrap Tire Program, thereby eliminating or avoiding a constitutional challenge.

In a series of cases, this Court has ruled that religious organizations are entitled to equal treatment with other organizations in the public arena. However, many state and local officials, and some courts as well, apparently don't "get it," because such discrimination continues today. This case presents an excellent opportunity for this Court to send a clear message: The State must not discriminate against the Church.

ARGUMENT

I. THIS IS AN APPROPRIATE CASE FOR THE COURT TO CONSIDER.

The Petitioner, Trinity Lutheran Church, has effectively demonstrated that this case is ripe for this Court's adjudication. The lower courts are split on the proper interpretation of this Court's ruling in *Locke v. Davey,* 540 U.S. 712 (2004); the Seventh Circuit and the Tenth Circuit have given the case a narrow interpretation while the First Circuit and now the Eighth Circuits, as well as the Colorado Supreme Court, have given the case a broad interpretation. And as Trinity has observed, this is a clean case in which the facts are clear and the issue is squarely presented.

Furthermore, the underlying issue comes up in innumerable ways all across the nation: May the State discriminate against the Church? May the State bus children to public and private schools but refuse to bus children to parochial schools? May state agencies refuse to rent their facilities to churches? May cities use zoning ordinances to prohibit churches in certain areas? May the State prohibit church services in federally-funded nursing homes? If there is "play in the joints" between that which the Establishment Clause forbids and that which the Free Exercise Clause requires, how is that "play" to be worked out in practice? State agencies, county commissions, city councils, school boards, and other governmental entities are besieged with questions about the proper place of the Church in the public arena, and they are looking to this Court for answers.

In many cases the Court has addressed the general issue of equal protection for religious entities, but it seems the message has not sunk in, because confusion still reigns. In *Widmar v. Vincent,* 454 U.S. 263 (1981), this Court held that state universities could not prohibit religious clubs from meeting on campus while other groups are allowed to meet. In *Westside School District v. Mergens*, 496 U.S. 226 (1990), this Court applied the same principle to public high schools. In *Rosenberger v. Rector & Visitors of University of Virginia,* 515 U.S. 819 (1995), this Court held that a state university cannot refuse to fund religious publications while funding other publications. And in *Lamb's Chapel v. Center Moriches Union free School District,* 508 U.S. 384 (1993), this Court held that a public school may not refuse to rent its facilities to a church while renting it to other organizations.

And yet, the issue keeps coming back. Many officials of local and state governmental entities seem to believe the Establishment Clause requires them to discriminate against churches, religious organizations, and religious people. This is the right time and the right case for this Court to settle the issue clearly, answering the question whether the State may discriminate against the Church, and if so, under what circumstances and with what limits it may do so.

II. THE EIGHTH CIRCUIT ERRED IN USING A RATIONAL BASIS TEST RATHER THAN A COMPELLING INTEREST/LESS RESTRICTIVE MEANS TEST TO EVALUATE PETITIONER'S HYBRID RELIGIOUS LIBERTY CLAIM

The Missouri DNR openly stated that its refusal to allow Trinity to participate in the Scrap Tire Grant Program was based on the fact that Trinity is a church. It is therefore inconceivable that the Eight Circuit would rule that Trinity does not have a valid free exercise claim that has been infringed by Missouri's refusal.

Thomas v. Review Board, Indiana Employment Security Division, 450 U.S. 707 (1881), involved a Jehovah's Witness whose employment at a foundry was terminated because he refused on religious conviction to build tank turrets. The Review Board denied his application for unemployment compensation because it considered his refusal to be valid grounds for termination. But this Court ruled 8-1 in favor of Thomas, saying at 717-18,

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

In so doing, the Court cited approvingly *Sherbert v. Verner,* 374 US. 398 (1963), in which the Court ruled in favor of a Seventh-Day Adventist who was terminated from her employment because she refused based on religious convictions to work on Saturday. The Court held 7-2 at 410 that "South

Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting a day of rest."

That is precisely what the State of Missouri requires for its Scrap Tire Grant Program: the applicant must either (1) cease operating the Learning Center as a ministry of Trinity Lutheran School, or (2) give up a substantial state benefit available to the general public, the benefit of being able to use scrap tire to provide a better and safer playground for its students. This is precisely what this Court said South Carolina may not do in *Sherbert* and what this Court said Indiana may not do in *Thomas*. Doing so constitutes a violation of Trinity's religious freedom under the Free Exercise Clause of the First Amendment.

III. MISSOURI'S "MINI-BLAINE" AMENDMNT IS BASED ON ANIMUS AND IS THEREFORE UNCONSTITUTIONAL

The Missouri DNR's openly stated that its refusal to allow Trinity to participate in the Scrap Tire Grant Program was based on the fact that Trinity is a church. This clearly constitutes religious discrimination. The question is, is there any justification for this discrimination against religion?

It is undisputed that the Trinity was fully qualified for the Scrap Tire Grant Program in every respect except for being a church-related school. There is no suggestion that Trinity's participation in the Scrap Tire Grant Program would violate any prong of the *Lemon* test. It has at least two clear secular purposes (ensuring that Trinity's children (and neighborhood children who use the playground)

have a safe playground and providing an environmentally-friendly way of using scrap tires); the primary effect of the Program as a whole does not advance or inhibit religion; and there is no excessive entanglement with religion. It involves no coercion, and it does not constitute government endorsement of religion because the Program is available to secular as well as (at least until now) religious organizations.

It is undisputed that sole reason for the Missouri DNR's refusal to allow Trinity to participate in the Program was the Article I, Section 7 of the Missouri State Constitution which provides in part that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof...; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

Amicus believes Article I Section 7 is unconstitutional on its face, but because Petitioner has argued only that the provision is unconstitutional as applied, *Amicus* will limit itself to that position.

Clearly, a state constitutional provision cannot infringe a right guaranteed by the United States Constitution, without justification. As *Amicus* has demonstrated in Part II of this brief, in this case that justification has to be a compelling interest that cannot be achieved by less restrictive means. The only interest cited by the Missouri DNR, and the only state interest recognized by the District Court and the Eighth Circuit, is adherence to Article I, Section 7. That interest is invalid because Article I Section 7 is unconstitutional, both facially and as applied.

In *Windsor v.* 570 U.S. ___ (2013), this Court struck down the federal Defense of Marriage Act, in large part because the Court concluded that DOMA was based on animus toward same-sex couples. As the Court said, "DOMA seeks to injure the very class New York seeks to protect", that the "avowed purpose and practical effect of the law...are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages....," and that "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal."

In *Obergefell v. Hodges,* ___ U.S. ___ (2015), this Court invalidated the marriage laws of Michigan, Ohio, Kentucky, and Tennessee, in part because laws prohibiting same-sex marriage reflected an animus toward same-sex couples. The opinion noted that

> Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment,

> barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as *Amicus Curiae* 5–28.
>
> For much of the 20th century, moreover, homosexuality was treated as an illness. ...

Just as laws prohibiting same-sex marriage were held to be invalid because they were based on animus toward homosexuals, so a state law forbidding aid to churches must be struck down if it is based upon animus toward religion, or toward a particular religion.

In fact, the evidence that Missouri's Article I Sec. 7 was based on animus toward Roman Catholics is just as strong as or stronger tan the evidence that same-sex marriage laws were based on animus toward homosexuals.

In *Mitchell v. Helms,* 530 U.S. 793 (2000), the plurality opinion of Justice Thomas, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy, declared at 828 that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." They continued at 828,

> Opposition to aid to "sectarian" schools acquired prominence in the 1870s with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to

> Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." See *generally* Green, *The Blaine Amendment Reconsidered*, 36 AM. J. Legal Hist. 38 (1992).

The plurality concluded at 829 that "the exclusion of pervasively sectarian schools from otherwise permissible aid programs [represented] a doctrine, born of bigotry, that should be buried now."

Likewise, in *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), three dissenting Justices (Breyer, J., joined by Stevens and Souter, JJ.) -- all different from the Justices who wrote the plurality opinion in *Mitchell* -- described the Protestant domination of public education in the early 1800s, the rising Catholic resistance to that Protestant domination, and the anti-Catholic sentiment that rose among Protestants as they saw "their" school system being threatened, and the Catholic response of establishing a system of Catholic schools. The three Justices wrote at 721,

> Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools. But the "Protestant position" on this matter, scholars report, "was that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic.)" And this sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend

> the United States Constitution (unsuccessfully) to make certain that government would not help pay for "sectarian" (i.e., Catholic) schooling for children. (citations omitted).

Animus need not be the sole, or even the primary, purpose of a statute for its application to constitute an Equal Protection Clause violation. It need only be a "'substantial' or 'motivating' factor behind enactment of the law." See *Hunter v. Underwood,* 471 U.S. 222, 228 (1985); *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 287 (1977). The evidence clearly establishes that animus toward Roman Catholics was a "substantial" or "motivating" factor behind the national Blaine amendment and the various state mini-Blaine amendments. Robert William Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry by Opponents of School Choice,* 59 N.Y.U. SURV. AM. L:. 413,434 (2003), concludes that the state interest enshrined in the Blain Amendments is not compelling; it is not an extension of the Establishment Clause but rather "historical discrimination against a religious minority." See also, Brandi Richardson, Comment: *Eradicating Blaine's Legacy of Hate: Removing the Barrier to State Funding of Religious Education,* 52 CATH. U.L.REV. 1041, 1071-72 (2003). And Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism,*1 5 YALE L. & POL'Y REV. 113, 146 (1996) cites The Nation, which was sympathetic to the Blaine Amendment, as acknowledging:

> Mr. Blaine did, indeed bring forward... a [United States] Constitutional amendment

> directed against the Catholics, but the anti-Catholic excitement was, as every one knows now, a mere flurry; and all that Mr. Blaine means to do or can do with his amendment is, not to pass it but to use it in the campaign to catch anti-Catholic votes.).

Although possibly not as intense as in other states, anti-Catholic bigotry existed in Missouri. H. Margaret Stauf, in her unpublished master's thesis titled *The Anti-Catholic Movement in Missouri: Post Civil War Period* (1936); on file with St. Louis University Pius Library), found that there were several periods of strong anti-Catholic sentiment in Missouri. One of these was during the period immediately following the War Between the States, caused by the Catholic Church's decision to remain neutral and refuse to denounce the Confederacy and may have resulted in the 1865 constitutional provision forbidding preference to be given by law to any church, sect or mode of worship. Although this anti-Catholic sentiment had waned somewhat by 1875 (the year Missouri's mini-Blaine amendment was adopted), it was still a factor.

For an excellent discussion of the narrowly-defeated federal Blaine Amendment and the various state mini-Blaine amendments, see Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn. L. Rev. 1047 (1995-1996); and see Aaron E. Schwartz, *Dusting off the Blaine Amendment: Two Challenges to Missouri's Anti-Establishment Tradition*, Missouri Law Review, Vol. 73, Iss. 1 (2008).

IV. THE COURTS HAVE A "DUTY TO SAVE" A CONSTITUTIONALLY INFIRM STATUTE OR STATE CONSTITUTIONAL PROVISION BY ADOPTING A CONSTRUCTION BY WHICH THE PROVISION IS CONSTITUTIONAL.

In *National Labor Relations Board v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979), this Court considered the refusal of the Catholic Bishop to recognize or bargain with unions claiming to represent lay teachers in the Catholic schools of the Diocese. The Church argued that (1) the National Labor Relations Act did not give the NLRB jurisdiction over parochial schools, and (2) if the Act did give the NLRB jurisdiction, the Act violated the Establishment and Free Exercise Clauses of the First Amendment.

The Court noted that if the Act gave the NLRB jurisdiction over parochial schools, there would arise a serious question about the Act's constitutionality; but if the Act did not give the NLRB jurisdiction over parochial schools, the constitutional issue would be resolved or at least avoided. Because both were reasonable interpretations of the Act, the Court concluded at 507:

> Accordingly, in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.

Like the National Labor Relations Act as interpreted by this Court in *NLRB v. Catholic Bishop of Chicago,* Article I Section 7 of the Missouri Constitution is capable of at least two reasonable interpretations, as Petitioner has argued and as *Amicus* will demonstrate in VI below. If the "no aid" provision of Clause I of the Article is interpreted standing alone to prohibit Trinity's participation in the Scrap Tire Program, it violates the Equal Protection Clause of the Fourteenth Amendment and the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment. But if the "no aid" provision of Clause I is interpreted in harmony with the "no discrimination" provision of Clause II, the constitutional issue is resolved or avoided. Because both are arguably reasonable interpretations, this Court has a "duty to save" the provision by interpreting both clauses in harmony with one another and holding that, as applied, Article I Section 7 does not prohibit Trinity's participation in the Scrap Tire Program.

I. THE CLAUSES OF ARTICLE I SECTION 7 INTERPRETED IN HARMONY TOGETHER, PERMIT TRINITY'S PARTICIPATION IN THE SCRAP TIRE PROGRAM

As Petitioner has demonstrated, Article I Section 7 contains two clauses. Clause 1 provides "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such...." Clause 2 provides "that no preference shall be given to nor any discrimination made against any

church, sect or creed of religion, or any form of religious faith or worship."

If the two clauses are interpreted together, the proper interpretation would be that the State may not give churches an unfair advantage or preference over other churches or, perhaps, over other institutions. But a provision to aid the secular aspects of education by providing safe playgrounds for children would not be "in the aid of any church, sect or denomination." Furthermore, to deny that aid to Trinity's Learning Center solely because it is owned and operated by Trinity Lutheran Church would constitute "discrimination made against any church, sect or creed of religion." Putting the two clauses together, allowing Trinity to participate in the Scrap Tire Program on an equal basis with other schools does not give "preference" to Trinity over other schools and does not discriminate against Trinity.

Because this is a reasonable interpretation of Article I Section 7, and because this interpretation would "save" the provision by eliminating or avoiding potential conflict with the United States Constitution, this Court should follow this interpretation.

CONCLUSION

This is a "clean" case in which the issues are clearly presented. The lower courts are split on whether and to what extent a state may discriminate against a church or religious organization by categorically excluding them from state programs. The requisites for a grant of certiorari are clearly present in this case.

Furthermore, this is a clear opportunity for the Court to send a clear message. In *Widmar*, *Mergens*, *Rosenberger*, *Lamb's Chapel*, and other cases, the Court appears to have sent a message that state and local governments must at least give equal treatment to churches and religious organizations and may not discriminate against them or exclude them solely because they are religious. However, many officials and even courts at the state and local levels of government seem to have missed that message or tried to work around it. This is a good case in which this Court can clarify once and for all: The State may not discriminate against the Church.

Respectfully submitted, this the 7th day of December, 2015.

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RECORD AND BRIEFS

Supreme Court, U.S.
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No. 15-577

In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR, MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE STATES OF NEVADA, ARIZONA, ARKANSAS, COLORADO, GEORGIA, MONTANA, OHIO, OKLAHOMA, UTAH & WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under the U.S. Constitution, particularly the Free Exercise and Equal Protection Clauses, can a State, after choosing to offer a neutral, generally available program to the public, administer it in ways that exclude some citizens on account of their religious beliefs?

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INTEREST OF *AMICUS CURIAE*[1]

The State of Nevada and other Amici States have a vital interest in protecting the constitutional rights of all state residents—whatever their religious beliefs. For example, the State of Nevada exists "for the protection, security and benefit of the people." Nev. Const. art. I, § 2. Consistent with those obligations, the State—acting through its Attorney General—is authorized by its citizens to commence, join, or participate in any suit necessary "to protect and secure the interest of the State." Nev. Rev. Stat. § 228.170.

Amici States' interest is particularly acute here. At least three States—Nevada, Colorado, and Missouri—are currently confronted with litigation that raises questions about the limits that the U.S. Constitution imposes on state constitutions' Blaine or No-Aid provisions. *See, e.g.*, *Duncan v. Nevada*, No. A-15-723703-C (Nev. D. Ct., Clark Cnty., filed Aug. 27, 2015); *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015), *petitions for a writ of cert. pending*, Nos. 15-556, 15-557, 15-558; *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 778 F.3d 779 (8th Cir. 2015), *petition for a writ of cert. pending*, No. 15-577. State and lower federal courts are deeply split on those limits, and States frequently find themselves as defendants on both sides of the question.

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[1] Counsel for Nevada notified parties' counsel of record more than ten days before the filing of this *amicus* brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2004, this Court in *Locke v. Davey* said that Washington State could exclude from a state's tuition aid program a collegian seeking a "devotional degree" that, by its nature, was "an essentially religious endeavor."[2] So this theology student could not enjoy state aid that his classmates in, say, anthropology or film studies might. But the Court emphasized that Washington's program went "a long way toward including religion in its benefits," and that its narrow restrictions on an otherwise broadly available public benefit were carefully tailored to avoid "funding the religious training of clergy," which historically "was one of the hallmarks of an 'established' religion."[3]

Other than *Locke*, this Court has in recent years consistently emphasized the principle of neutrality in considering programs of generally available state aid: religious individuals and organizations should not be treated any better than other eligible recipients of state money, but no worse either. *See infra*, Section IV. But since *Locke*, state and federal jurists have widely disagreed on how much of an exception *Locke*'s "play in the joints" metaphor allows in excluding religious organizations and individuals from otherwise generally available, neutral programs of state aid. *Locke* concluded that a State, when it decides to offer a benefit to all but a select few, on account of their faith, can "draw[] a more stringent line" than the one

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[2] 540 U.S. 712, 721, 725 (2004).

[3] *Id.* at 722 & n.6, 724.

sketched by the U.S. Constitution.[4] This case presents the question in the most striking terms of when that line, pushed too far, becomes an impermissible state-imposed disability.

Amici States believe that the Court has taught, in many cases, that when it comes to generally available, neutral programs, the U.S. Constitution, especially its Free Exercise and Equal Protection Clauses, requires faith-blindness almost as rigorously as it does color-blindness. But some courts have read *Locke* to approve interpretations of state provisions that, as here, arguably push "no aid" into the realm of discrimination *against* religion. Amici States respectfully ask the Court to use this case to clarify the limits of *Locke*'s recognition of "play in the joints."

ARGUMENT

I. *Locke* and the No-Aid conundrum

Locke was narrow. The "only interest at issue," the Court said, was Washington's interest in "not funding the religious training of clergy,"[5] an interest so rooted in history as to be practically in a class by itself.[6] The Court emphasized that Washington's "disfavor" of faith, if it could be characterized as such, lay in its refusal to create a pastor. But the panel below split

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[4] *Id.* at 722.

[5] *Id.* at 722 n.5.

[6] *See* Richard D. Komer and Clark Neily, School Choice and States Constitutions, Inst. for Justice and Am. Legislative Exch. Council (Apr. 2007), *available at* http://ij.org/report/school-choice-and-state-constitutions/.

over whether, under *Locke*, the Free Exercise Clause lets Missouri deny a church access to a generally available, neutral program that, even if the church participated, would have nothing to do with religion. Unlike refusing to fund clergy, refusing to protect children equally from injury because they play at a church has neither the sanction of history nor Mr. Madison.

Trinity Lutheran Church applied to Missouri's Scrap Tire Grant Program for repurposed rubber to soften its playgrounds. The problem is that Trinity Lutheran Church is Lutheran. Missouri officials explained that their hands were tied by their Constitution's provision that says "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."[7]

About 35 States have provisions like Missouri's, conventionally called Blaine or No-Aid provisions, that disallow, in varying degrees, public funds from flowing to "religious" or "sectarian" recipients. Interpretations of these amendments are all over the map, geographically, of course, but also legally, philosophically, and even spiritually. In fraught cases ranging from book loans to orphanages to educational-choice programs, state and federal courts, faced with similar facts and constitutional language, reach opposite conclusions. But what unites these tribunals today is gaping disagreement about what constraint is imposed by the U.S. Constitution and particularly the decision in *Locke*.

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[7] Mo. Const. art. I, § 7; Pet. App. 152a-53a (denial letter).

For instance, in a Colorado case involving scholarships—whose Respondents are also now petitioning this Court for certiorari—three Justices read *Locke* to stand for the notion that state constitutions "may draw a tighter net around the conferral" of aid—in that case, money for pre-college private-schoolers.[8] The dissenters felt that this turned what the *Locke* Court saw as a guppy net—designed to catch the occasional pastor-in-training—into a vast trammel, cutting off (as it were) entire schools.[9] In a Florida court, sitting *en banc*, eight judges (with six judges dissenting) thought *Locke* "recognized" that a No-Aid provision could disqualify from funding not only a few devotional students but *all* "religious institutions."[10]

These conclusions ill fit with the Court's proviso in *Locke* that the "only" interest at issue was in "not funding the religious training of clergy."[11] Justice Scalia, in dissent, feared that the majority's logic would justify exclusion of religion from "public programs in virtually any context."[12] The Court reassured its

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[8] *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 351 P.3d 461, 474 (Colo. 2015), *petitions for cert. filed*, Nos. 15-556 (U.S. Oct. 27, 2015), 15-557 (U.S. Oct. 28, 2015), *and* 15-558 (U.S. Oct. 28, 2015).

[9] *Id.* at 479-80 (Eid, J., dissenting).

[10] *Bush v. Holmes*, 886 So. 2d 340, 360, 363-64 (Fla. Dist. Ct. App. 2004), *aff'd in part on other grounds*, 919 So. 2d 392 (Fla. 2006).

[11] 540 U.S. at 722 n.5.

[12] *Id.* at 730 (Scalia, J., dissenting).

readers that "[n]othing in our opinion" suggested that.[13] Many judges, however, see something the Court did not.

The case below, and others like it, matter because States end up on both sides of these challenges. State agencies, seeking to honestly apply their State's No-Aid provisions, treat religious organizations and individuals differently—and get sued for differentiating. State legislatures pass laws making benefits generally available (like school-choice programs)—and the State gets sued for *failing* to differentiate. State and federal courts look to other state and federal decisions for guidance, but the courts are split. Often, as in the decision below and the Colorado case pending before this Court, the judges in the same jurisdiction reach polar opposite conclusions.

Powerful arguments have been made about federal constitutional limits on a State's No-Aid or Blaine provision to categorically exclude individuals or groups on the basis of religion, from neutral, generally available benefits. The certiorari petitions in the Colorado case catalogue most of them.[14] These arguments should come as no surprise, for Justices of this Court anticipated the problem: the plurality in *Mitchell v. Helms* wrote that "to require exclusion of

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[13] *Id.* at 722 n.5 (plurality opinion).

[14] *See* Petition for Writ of Certiorari, *Doyle v. Taxpayers for Pub. Educ.*, No. 15-556 (U.S. filed Oct. 27, 2015); Petition for Writ of Certiorari, *Douglas Cnty. Sch. Dist. v. Taxpayers for Pub. Educ.*, No. 15-557 (U.S. filed Oct. 28, 2015); Petition for Writ of Certiorari, *Colo. State Bd. of Educ. v. Taxpayers for Pub. Educ.*, No. 15-558 (U.S. filed Oct. 28, 2015).

religious schools" from a generally available and neutral program would "raise serious questions under the Free Exercise Clause."[15]

II. Blaine's background

The Court has encouraged lawyers to study the history of anti-Catholic animus in America, a fact of life even before the States were United. In 1767, Boston patriots paraded to celebrate "Liberty & Property" and denounce "Devils" and "Popes."[16] The antagonism reached a high pitch during the 1884 presidential campaign, where, at a Manhattan rally for James G. Blaine, an over-candid preacher blasted Democrats as the party of "rum, Romanism, and rebellion"—which, lore says, cost Blaine vital Irish support in a State he lost by 600 votes.[17] It was Blaine who, a decade earlier, proposed the eponymous amendment to debar "sectarian" institutions from the use of public funds. A plurality in *Mitchell* recognized that state Blaine amendments "arose at a time of pervasive hostility ... to Catholics" and constitutionalized an idea "born of bigotry."[18] Justice Breyer's dissent in *Zelman v. Simmons-Harris* drew on scholarship showing that anti-Catholicism was a "significant" force behind the successful movement to rewrite state constitutions to

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[15] 530 U.S. 793, 835 n.19 (2000).

[16] Robert Middlekauff, *The Glorious Cause: The American Revolution, 1763-1789*, at 163 (1982).

[17] Leslie H. Southwick, *Presidential Also-Rans and Running Mates, 1788 through 1996*, at 385-86 (2d ed. 1998).

[18] 530 U.S. at 828-29 (plurality opinion).

exclude Catholic schools from public money.[19] Seven justices, in these two cases, agreed on this history.

III. The "sectarian" problem

Judges and scholars alike mostly agree that, as framed, most No-Aid or Blaine provisions were not meant to bar aid to *religion* generally, but to bar aid, as Missouri's constitution puts it, to any "church, sect or creed of religion." Mo. Const. art. I, § 7. The reference to "sects"—or, in many States, "sectarian"[20]—is significant. Seven Justices agreed, reviewing the history, that "sectarian" was code for "Catholic."[21]

"Sectarian" did not mean merely "religious." Most 19th-century Americans thought that there was something like an all-embracing Christianity, and it

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[19] 536 U.S. 639, 720-21 (2002) (Breyer, J., dissenting).

[20] Ala. Const. art. XIV, § 263; Alaska Const. art. VII, § 1; Ariz. Const. art. IX, § 10; Cal. Const. art. XVI, § 5; Colo. Const. art. IX, § 7; Del. Const. art. X, § 3; Fla. Const. art. I, § 3; Ga. Const. art. I, § II, Para. VII; Idaho Const. art. IX, § 5; Ill. Const. art. X, § 3; Kan. Const. art. VI, § 6(c); Ky. Const. § 189; Mich. Const. art. I, § 4; Minn. Const. art. XIII, § 2; Miss. Const. art. VIII, § 208; Mont. Const. art. X, § 6; Neb. Const. art. VII, § 11; Nev. Const. art. XI, § 10; N.D. Const. art. VIII, § 5; Ohio Const. art. VI, § 2; Okla. Const. art. II, § 5; Pa. Const. art. III, § 15; S.D. Const. art. VIII, § 16; Tex. Const. art. I, § 7; Utah Const. art. X, § 1; Va. Const. art. IV, § 16; Wash. Const. art. IX, § 4; Wyo. Const. art. I, § 19.

[21] *Mitchell*, 530 U.S. at 828 (plurality opinion); *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting).

looked much like mainline Protestantism.[22] Catholic resistance to classroom reading of the King James Bible and the Lord's Prayer drew forth Catholic objection to the public schools' so-called "nonsectarian instruction," and resulted in the creation of Catholic schools.[23] But virtually *all* schools in the era when state Blaine Amendments were enacted were marked by religious instruction and observance.[24] No-Aid provisions were not intended to scrub all religion from the publicly funded square, but only *particular* "sectarian" expressions of religion. That kind of discrimination between religions would clearly be unconstitutional today.[25] Reinterpreting those provisions to apply more broadly to *all* religion, instead of merely *some* religions or religious practices, doesn't really address the original constitutional difficulty. It is hard to see how broadening impermissible discrimination somehow makes it permissible.

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[22] *See* Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. Rev. 295, 302 (2008) ("That the common schools were consciously Protestant was not denied ....").

[23] *Id.* at 304; Vincent P. Lannie, *Alienation in America: The Immigrant Catholic and Public Education in Pre-Civil War America*, 32 Rev. Pol. 503, 507-08, 511 (1970); *Zelman*, 536 U.S. at 720-21 (Breyer, J., dissenting) (citing John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 299-300 (2001)).

[24] Green, *supra* note 22, at 300-08.

[25] *See, e.g., Larson v. Valente*, 456 U.S. 228, 246 (1982).

IV. The keys: "neutrality" and "general availability"

The panel below recognized that Missouri's No-Aid provision would not survive under the rule proposed in Justice Scalia's *Locke* dissent, *i.e.*, that a State cannot offer a benefit to all residents, then snatch it back only from the religious. The panel added that Justice Scalia's rule was a "logical" leap in the direction that this Court "seems to be going."[26] This would not be the first time an appeals court recognized that this Court had thoroughly "undermined" decisions binding on the appeals court, while leaving to the Court itself the unpleasant duty of the coup de grâce.[27]

The decision the panel believed itself bound by, *Luetkemeyer v. Kauffman*, was this Court's wordless affirmation of a three-judge district court ruling in 1973. The dissent in that 1973 panel called Missouri's denial of busing service to parochial-school students "odious" discrimination against children of the "same state and country."[28] This Court was split, too: Justice White and Chief Justice Burger, in dissent, raised Free Exercise and Equal Protection concerns and found it hard to believe that Missouri had a rational antiestablishment basis to exclude Show-Me students from busing when *Everson* had said that *including*

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[26] Pet. App. 11a.

[27] *See, e.g., Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago*, 567 F.3d 856, 857 (7th Cir. 2009), *rev'd and remanded sub nom. McDonald v. City of Chicago*, 561 U.S. 742 (2010).

[28] *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376, 387-89 (W.D. Mo. 1973) (Gibson, J., dissenting).

such students caused no such establishment problem.[29] More to the point, *Luetkemeyer* is 40 years old. The district court decision, for instance, was heavily scented with *Lemon*.[30]

The panel below did not elaborate on why the leap it refused to make was "logical." Perhaps this was because the path forward is so clear. Two concepts, in particular, have become this Court's unmistakable signposts: "neutrality" and "general availability." Like those dusty roads that led to Rome, these words, in Free Exercise and Establishment cases, all point to the intuition that the State, when it hands out valuable benefits to everyone, should be neutral between faiths or between faith and non-faith.

This Court recognizes the "tension" that "inevitably exists" between the Free Exercise and Establishment Clauses.[31] Excessive solicitude for religion can run into Establishment problems; excessive exclusion can intrude on Free Exercise. Thus, the Court's case law requires the State to "maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion."[32] Neutrality is not merely an Establishment

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[29] *Luetkemeyer v. Kaufmann*, 419 U.S. 888, 889-90 (1974) (without opinion) (White, J., dissenting).

[30] *Luetkemeyer*, 364 F. Supp. at 381, 383-84.

[31] *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973); *Thomas v. Review Bd.*, 450 U.S. 707, 719 (1981); *Locke*, 540 U.S. at 718.

[32] *Nyquist*, 413 U.S. at 788.

or Free Exercise doctrine, but the posture that ensures "proper respect for both."[33]

The concepts of neutrality and general availability run through Free Exercise law. In *Sherbert v. Verner*, the Court said that extending unemployment benefits to Sabbatarians, in common with Sunday worshippers, "reflects nothing more than the governmental obligation of neutrality in the face of religious differences."[34]

Neutrality and general availability helped decide Establishment Clause cases, too. In *Mitchell,* the Court said that in such conflicts it had "consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion."[35] Similar reasoning reigned in *Agostini v. Felton*,[36] *Zobrest v. Catalina Foothills School District*,[37] and *Mueller v. Allen*.[38]

Sometimes neutrality and general availability appear in decisions that do not distinguish between Establishment and Free Exercise. In *Everson v. Board of Education of Ewing*, the Court upheld a program to bus public- and private-school students alike. The

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[33] *Id.* at 792.

[34] 374 U.S. 398, 409 (1963).

[35] 530 U.S. at 809.

[36] 521 U.S. 203, 231-32 (1997).

[37] 509 U.S. 1, 8 (1993).

[38] 463 U.S. 388, 397 (1983).

Court said that the joint effect of First Amendment's religion provisions was to require a State to be "neutral in its relations with groups of religious believers and non-believers."[39] In another case, Justice O'Connor saw "equal treatment" as the "eminently sound approach":

> In my view, the Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits.[40]

V. Principles pushed to the extreme

The Court has "struggled to find a neutral course between the two Religion Clauses," because either one, "expanded to a logical extreme, would tend to clash with the other."[41] Inattention to this dilemma was the flaw in *Luetkemeyer*'s panel decision; it said that Missouri could, apparently without limit, mandate a "degree" of separation "higher" than the First Amendment's minimum.[42] Missouri's provision, like most No-Aid laws, is an Establishment Clause

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[39] 330 U.S. 1, 18 (1947).

[40] *Bd. of Educ. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring).

[41] *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970).

[42] *Luetkemeyer*, 364 F. Supp. at 386.

retrofitted with a height extension.[43] But if raised *too* high, conflict with Free Exercise is inevitable. The religion clauses are not an area of constitutional law, like criminal procedure, where a State can grant more protections than the U.S. Constitution promises without end. With the religion clauses, States face a floor *and* a ceiling.

There may be a need for some play in the joints. But the argument that not one taxpayer dollar must ever end up mingled with the assets of a religiously affiliated entity, because each dollar, even if given for a permissible purpose, might defray actual religious expenses, replaces neutrality with hostility and discrimination.[44] It is a theory better suited to our anti-terrorism law.[45]

Locke said Washington had a legitimate basis to decline specifically to underwrite clergy-training.[46] The panel below, by contrast, said Missouri had *general* antiestablishment concerns.[47] Amici States would never trivialize the importance of a sincere policy against direct state support for churches, a venerable principle that arose in reaction to centuries of actual established state religion. But the proper inquiry here is the actual

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[43] *Id.* at 383.

[44] *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 747 (1976).

[45] *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010).

[46] 540 U.S. at 720 n.3.

[47] Pet. App. at 17a.

basis for *this* program.[48] *Locke* did not simply rest on historical practice and early state constitutions; it considered the precise functioning of Washington's program, and the burden its exclusion imposed, finding it significant, for instance, that the scholarship could still be used for certain devotional theology courses, just not the "pastoral ministries" major.[49] Trinity Lutheran Church did not ask for new pews. It asked for ground-up tires to protect kids playing from injury. And in this respect it is similarly situated to every other preschool or daycare.

The Missouri tire-recycling program, which aims at once to reduce landfills and harm to children,[50] cannot serve any religious purpose. When the benefits sought have no tie to religion, withholding those benefits from churches alone seems arbitrary and unfair. Are the religious commitments of playground administrators really more relevant than those of religious hospital operators?[51] "The essence of all that has been said and written" on free exercise, said the Court in *Wisconsin v. Yoder*, is that only "interests of the highest order ... can overbalance legitimate claims to the free exercise."[52] This case lets the Court test how well

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[48] *See, e.g., Bronx Household of Faith v. Bd. of Educ.*, 750 F.3d 184, 188 (2d Cir. 2014).

[49] *Locke*, 540 U.S. at 717, 724.

[50] Mo. Rev. Stat. § 260.273(6)(2); App. 86a-88a, App. 89a.

[51] *See Bradfield v. Roberts*, 175 U.S. 291, 298 (1899); Pet. App. 132a-33a.

[52] 406 U.S. 205, 215 (1972).

Trinity Lutheran Church's disqualification stacks up to this statement in *Yoder*—and whether, more specifically, *Locke* really supports the outcome below.

CONCLUSION

The nature of this area may explain the surprisingly confessional tone from Members of the Court in its jurisprudence here. "Candor compels acknowledgment," said the *Lemon* Court, "that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[53] Justice Jackson, concurring in *McCollum*, admitted that it was "idle to pretend" that judges could decide "where the secular ends and the sectarian begins."[54] If the Court kept taking these cases, he continued, it was destined to make Jefferson's wall of separation "serpentine."[55] This is a particularly apt adjective for the State and lower-federal court jurisprudence interpreting State No-Aid provisions, especially in light of *Locke*.

Trinity Lutheran's playground is an excellent place to decide when "no aid" becomes unconstitutional. State and federal courts need the next step in the *Locke* line to clarify what limits the U.S. Constitution places on State Blaine provisions. Amici believe that, under the U.S. Constitution, particularly the Free Exercise and Equal Protection Clauses, a State generally may not, after choosing to offer a religion-neutral, generally

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[53] *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

[54] *McCollum v. Bd. of Educ.*, 333 U.S. 203, 237-38 (1948) (Jackson, J., concurring).

[55] *Id.* at 238.

available program, administer it in ways that exclude a subset of constituents merely on account of their religious beliefs. If a State means to benefit citizens, it should benefit citizens, regardless of irrelevant incidentals like creed. Too much zeal to deny otherwise generally available government benefits to the faith-based smacks of discrimination. Missouri sincerely insists that it is simply enforcing the "absolute separation" of church and state required by its constitution.[56] Amici States here just as sincerely suggest—with all the respect due to a sister State—that in some cases "absolutism" is a synonym for unconstitutional "extremism."

Respectfully submitted,

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December 2015

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[56] *See, e.g.*, *Saint Louis Univ. v. Masonic Temple Ass'n*, 220 S.W.3d 721, 729 (Mo. 2007) (en banc); *Americans United v. Rogers*, 538 S.W.2d 711, 720 (Mo. 1976) (en banc); *Paster v. Tussey*, 512 S.W.2d 97, 101 (Mo. 1974) (en banc).

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Supreme Court, U.S.
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No. 15-577

In the

Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RELEVANT CONSTITUTIONAL PROVISIONS

The text of the First Amendment to the United States Constitution is as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The text of Section 1 of the Fourteenth Amendment to the United States Constitution is as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Relevant Docket Entries:
United States District Court for the
Western District if Missouri (Jefferson City)
No. 2:13-cv-04022-NKL

Date Filed	#	Docket Text
01/25/2013	1	COMPLAINT against Sara Parker Pauley filed by Joel L. Oster on behalf of Trinity Lutheran Church of Columbia, Inc.. Filing fee $350, receipt number 0866-3388578. Service due by 5/31/2013. (Attachments: # 1 Civil Cover Sheet, # 2 Disclosure of Corporation Interests) (Oster, Joel) Modified on 1/28/2013 to delete and refile correctly the Disclosure of Corporate Interests (Bax, Laura). (Entered: 01/25/2013)
		* * *
02/19/2013	9	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *and Suggestions in Support* filed by Jeremy Daniel Knee on behalf of Sara Parker Pauley. Suggestions in opposition/ response due by 3/8/2013 unless otherwise directed by the court. (Knee, Jeremy) (Entered: 02/19/2013)
		* * *

Date Filed	#	Docket Text
03/28/2013	15	CERTIFICATE OF SERVICE OF INITIAL RULE 26 DISCLOSURES filed by Donald A. Willoh, Jr on behalf of Defendant Sara Parker Pauley. (Willoh, Donald) (Entered: 03/28/2013)
		* * *
03/28/2013	16	CERTIFICATE OF SERVICE OF INITIAL RULE 26 DISCLOSURES filed by Joel L. Oster on behalf of Plaintiff Trinity Lutheran Church of Columbia, Inc.. (Oster, Joel) (Entered: 03/28/2013)
		* * *
04/05/2013	20	SUGGESTIONS in opposition re 9 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *and Suggestions in Support* filed by Joel L. Oster on behalf of Plaintiff Trinity Lutheran Church of Columbia, Inc.. Reply suggestions due by 4/22/2013 unless otherwise directed by the court (Attachments: # 1 Exhibit A)(Related document(s) 9) (Oster, Joel) (Entered: 04/05/2013)
		* * *

06/10/2013	29	REPLY SUGGESTIONS to motion re 9 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *and Suggestions in Support Defendant's Reply to Plaintiff's Response to Defendant's Motion to Dismiss and Suggestions in Support* filed by Donald A. Willoh, Jr on behalf of Defendant Sara Parker Pauley. (Related document(s) 9) (Willoh, Donald) (Entered: 06/10/2013)
		* * *
09/26/2013	34	ORDER entered by Judge Nanette Laughrey. Defendant Pauley's motion to dismiss 9 is GRANTED and this case DISMISSED, with prejudice. (Smith, Fran) (Entered: 09/26/2013)
		* * *
09/27/2013	35	CLERK'S JUDGMENT (Bax, Laura) (Entered: 09/27/2013)
		* * *
10/23/2013	36	MOTION for reconsideration re 34 Order on Motion to Dismiss for Failure to State a Claim filed by Joel L. Oster on behalf of Trinity Lutheran Church of Columbia, Inc.. Suggestions in opposition/response due by

11/12/2013 unless otherwise directed by the court. (Attachments: # 1 Suggestions in Support of Motion for Reconsideration Requesting Leave to Amend Complaint, # 2 Exhibit First Amended Complaint, # 3 Exhibit A - Scrap Tire Program Grant Application, # 4 Exhibit B - Previous Grant Recipients, # 5 Exhibit C - Previous Grant Recipients Websites, # 6 Exhibit D - May 23 Email from DNR, # 7 Exhibit E - May 21 Letter from DNR)(Related document(s) 34) (Oster, Joel) (Entered: 10/23/2013)

* * *

11/12/2013 37 SUGGESTIONS in opposition re 36 MOTION for reconsideration re 34 Order on Motion to Dismiss for Failure to State a Claim filed by Donald A. Willoh, Jr on behalf of Defendant Sara Parker Pauley. Reply suggestions due by 11/29/2013 unless otherwise directed by the court (Related document(s) 36) (Willoh, Donald) (Entered: 11/12/2013)

* * *

12/02/2013	38	REPLY SUGGESTIONS to motion re 36 MOTION for reconsideration re 34 Order on Motion to Dismiss for Failure to State a Claim filed by Joel L. Oster on behalf of Plaintiff Trinity Lutheran Church of Columbia, Inc.. (Related document(s) 36) (Oster, Joel) (Entered: 12/02/2013)
		* * *
01/07/2014	39	ORDER entered by Judge Nanette Laughrey. Plaintiff Trinity Lutheran Church of Columbia, Inc.'s motion to reconsider and for leave to file an amended complaint, 36, is DENIED. (Weber, Alex) Modified on 1/7/2014 to attached signed order. (Matthes, Renea). (Entered: 01/07/2014)
		* * *
02/04/2014	40	NOTICE OF APPEAL as to 39 Order on Motion for Reconsideration, 34 Order on Motion to Dismiss for Failure to State a Claim by Trinity Lutheran Church of Columbia, Inc.. Filing fee $ 505, receipt number 0866-3824956. (Oster, Joel) (Entered: 02/04/2014)
		* * *

03/14/2014	44	ELECTRONIC TRANSCRIPT of Oral Argument held September 19, 2013 before Judge Nanette K. Laughrey. Court Reporter: Lissa Whittaker, 816-914-3613, rapidtranscript@gmail.com. Number of pages: 25. NOTICE RE: REDACTION OF TRANSCRIPTS: Within 7 calendar days of this filing, each party shall inform the Court, by filing a Notice of Redaction, of the parties' intent to redact personal data identifiers from the electronic transcript of the court proceeding. The policy is located on our website at www.mow.uscourts.gov. Please read this policy carefully. NOTICE: Attorneys must contact the court reporter for copies during this 90 day period. Notice of Intent to File Redaction of Transcripts due by 3/21/2014. Release of Transcript Restriction set for 6/12/2014. (Whittaker, Lissa) (Entered: 03/14/2014)

* * *

Relevant Docket Entries:
United States Court of Appeals
For the Eighth Circuit
No. 14-1382

Date Filed	#	Docket Text
02/21/2014	4126088	Civil case docketed. [4126088] [14-1382] (CAH)
		* * *
02/21/2014	4126092	Originating court document filed consisting of notice of appeal, docket entries, order of 9/26/13, judgment of 9/27/13, order of 1/7/14. [4126092] [14-1382] (CAH)
		* * *
04/25/2014	4148835	RECORD FILED - JOINT APPENDIX, 2 volumes, Location STL, Comments: Appellant's counsel contacted and advised to send three copies of district court docket sheet. [4148835] [14-1382] (CMD)
		* * *
04/28/2014	4148190	**BRIEF FILED** - APPELLANT BRIEF filed by Trinity Lutheran Church. w/service 04/25/2014 , Length: 11,609 words. **10 COPIES OF**

Date Filed	#	Docket Text
		PAPER BRIEFS FROM Trinity Lutheran Church due 05/05/2014 WITH revised certificate of service for paper briefs. Brief of Sara Parker Pauley due on 05/28/2014 [4148190] [14-1382] (CMD)
		* * *
04/28/2014	4148191	**ADDENDUM** of APPELLANT FILED by Appellant Trinity Lutheran Church, w/service 04/28/2014 [4148191] [14-1382] (CMD)
		* * *
06/18/2014	4166477	**BRIEF FILED** - APPELLEE BRIEF filed by Ms. Sara Parker Pauley, w/service 06/18/2014, Length: 9,006 words **10 COPIES OF PAPER BRIEFS FROM Sara Parker Pauley due 06/23/2014 WITH revised certificate of service for paper briefs.** Reply brief of Trinity Lutheran Church due on 07/02/2014. [4166477] [14-1382] (AMT)

Date Filed	#	Docket Text
		* * *
07/16/2014	4176030	**BRIEF FILED** - APPELLANT REPLY BRIEF filed by Trinity Lutheran Church. w/service 07/16/2014, Length: 4,869 words **10 COPIES OF PAPER BRIEFS FROM Trinity Lutheran Church due 07/21/2014 WITH revised certificate of service for paper briefs** [4176030] [14-1382] (AMT)
		* * *
01/15/2015	4234991	**ARGUED & SUBMITTED in Special Session** to Judges James B. Loken, Michael J. Melloy, Raymond W. Gruender on 01/15/2015. Mr. Joel Lee Oster for Appellant Trinity Lutheran Church and Mr. James Robert Layton for Appellee Ms. Sara Parker Pauley. -- Rebuttal by Mr. Joel Lee Oster for Trinity Lutheran Church.-- **RECORDED** [4234991] [14-1382] (DMW)
		* * *

Date Filed	#	Docket Text
05/29/2015	4279990	OPINION FILED - THE COURT: James B. Loken, Michael J. Melloy and Raymond W. Gruender AUTHORING JUDGE: James B. Loken (PUBLISHED), CONCUR AND DISSENT BY: RAYMOND W. GRUENDER [4279990] [14-1382] (AMT) * * *
05/29/2015	4280011	**JUDGMENT FILED** - The judgment of the Originating Court is AFFIRMED in accordance with the opinion. JAMES B. LOKEN, MICHAEL J. MELLOY and RAYMOND W. GRUENDER Hrg Jan 2015 [4280011] [14-1382] (AMT) * * *
06/09/2015	4283683	MOTION for extension of time to file petition for rehearing until 06/26/2015, filed by Attorney Mr. Erik William Stanley for Appellant Trinity Lutheran Church w/service 6/09/2015. [4283683] [14-1382] (EWS)

Date Filed	#	Docket Text
		* * *
06/09/2015	4283733	CLERK ORDER: Granting [4283683-2] motion for extension of time to file rehearing filed by Mr. Erik William Stanley. Petition for Rehearing due on 06/26/2015 [4283733] [14-1382] (AMT)
		* * *
06/26/2015	4289422	PETITION for enbanc rehearing and also for rehearing by panel filed by Appellant Trinity Lutheran Church w/service 06/26/2015 [4289422] [14-1382] (EWS)
		* * *
06/26/2015	4290173	BRIEF in support of Petition for Rehearing filed by Amici Curiae Christian Legal Society and National Association of Evangelicals [4290173] [14-1382] (AMT)
		* * *
07/14/2015	4294956	JUDGE ORDER: A petition for rehearing has been filed by the Appellant Trinity Lutheran Church in the above case. The court

Date Filed	#	Docket Text
		requests a response to the petition for rehearing en banc. The response is limited to fifteen pages and should be filed electronically. Response due on 07/24/2015 by Appellee Sara Parker Pauley. Hrg Jan 2015 [4294956] [14-1382] (AMT)
		* * *
07/24/2015	4298763	RESPONSE in opposition to petition for enbanc rehearing [4289422-2], petition for rehearing by panel [4289422-3] filed by Attorney Mr. James Robert Layton for Appellee Ms. Sara Parker Pauley, w/service 07/24/2015. [4298763] [14-1382] (JRL)
		* * *
08/11/2015	4304572	JUDGE ORDER: The petition for rehearing en banc is denied by an equally divided court. The petition for panel rehearing is also denied. Judges Riley, Smith, Colloton, Gruender and Shepherd would grant rehearing en banc. [4289422-2],

Date Filed	#	Docket Text
		PUBLISHED ORDER. Hrg Jan 2015 [4304572] [14-1382] (AMT)
		* * *
08/18/2015	4306944	MANDATE ISSUED. [4306944] [14-1382] (AMT)
		* * *

RECORD AND BRIEFS

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 15-577

In the

Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.

PARTIES TO THE PROCEEDING

Petitioner is Trinity Lutheran Church, Inc.

Respondent is Sara Parker Pauley, in her official capacity as Director of the Missouri Department of Natural Resources.

CORPORATE DISCLOSURE STATEMENT

Petitioner Trinity Lutheran Church is a non-profit corporation, exempt from taxation under 26 U.S.C. § 501(c)(3). It does not have parent companies and is not publicly held.

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INTRODUCTION

Missouri's Scrap Tire Grant Program provides reimbursement for rubber safety flooring for all playgrounds that meet certain neutral criteria—except for playgrounds owned by churches and religious organizations. Trinity Lutheran Church was denied participation in this recycling and child safety program solely because of who it is—a church—even though the Missouri Department of Natural Resources ("DNR") ranked its application fifth out of forty-four submitted. In the name of the Missouri state constitution's antiestablishment principle, the DNR violates the United States Constitution's free exercise and equal protection guarantees. And it does so even though including religious entities in the program would equally further the state's goals of keeping tires out of Missouri's' landfills and fostering children's safety. A rubber playground surface accomplishes the state's purposes whether it cushions the fall of the pious or the profane.

The DNR's categorical exclusion of religion in this case is unvarnished status-based discrimination that violates the Free Exercise and Equal Protection Clauses. A categorical ban on religion here is merely an overbroad and unconstitutional restriction on the faithful's ability to participate on equal terms in public life. This Court should protect the free exercise of religion in our Nation by rebuffing the DNR's gratuitous attempt to "impose special disabilities on the basis of religious status," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,

508 U.S. 520, 533 (1993) (quotation and alteration omitted).

OPINIONS AND ORDERS BELOW

The Eighth Circuit's decision affirming the judgment for Respondent is reported at 788 F.3d 779 and reprinted in the Petition for Writ of Certiorari Appendix ("Pet. App.") at 1a-31a. The Eighth Circuit's order denying rehearing en banc is unreported but reprinted at Pet. App. 32a-33a.

The District Court's opinion granting Respondent's motion to dismiss is reported at 976 F. Supp. 2d 1137 and reprinted at Pet. App. 34a-75a. The District Court's opinion denying Petitioner's motion for reconsideration and for leave to file an amended complaint is unreported but reprinted in Pet. App. 76a-84a.

STATEMENT OF JURISDICTION

The Eighth Circuit issued a 2-1 opinion on May 29, 2015, and, by an equally divided court, denied rehearing en banc on August 11, 2015. Trinity Lutheran filed its Petition in this Court on November 4, 2015, which was granted on January 15, 2016. The Court extended the time in which to file Petitioner's brief on the merits to and including April 14, 2016. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The text of the First and Fourteenth Amendments to the United States Constitution are set forth in the Joint Appendix at 1.

The text of Article I, § 7, of the Missouri Constitution is set forth at Pet. App. 85a.

Missouri Statute § 260.273, the statutory authorization for the Scrap Tire Grant Program under review, is set forth at Pet. App. 86a-88a.

Title 10 § 80-9.030 of the Missouri Code of State Regulations, the administrative regulation establishing the Scrap Tire Grant Program, is set forth at Pet. App. 89a-96a.

The list of criteria the Department of Natural Resources uses to evaluate and rank the scrap tire grant applications is set forth in an Addendum to this Brief at 1a-19a.

STATEMENT OF THE CASE

A. Statement of Facts

Trinity Lutheran Church operates a pre-school education and daycare center named The Learning Center. Pet. App. 99a. The Learning Center formerly operated as a separate entity but merged into the Church in 1985 and has operated as a Church ministry ever since. Pet. App. 99a.

Enrollment at The Learning Center averages ninety children ages two through five. Pet. App. 100a. The Learning Center is licensed by the State of Missouri. Pet. App. 131a.

The Learning Center has a playground for the children who attend. Pet. App. 102a. At any given play period, about thirty to forty children use the playground. Pet. App. 132a. Children from the surrounding community also use the playground after school hours and on weekends. Pet. App. 133a.

Children need a safe place to play. The existing playground surface of pea gravel and grass does not adequately protect the children from injury. Pet. App. 132a. The hard, jagged edges of the pea gravel are unforgiving and shift away from the play equipment thereby posing a safety risk to children. *Id.*

In 2012, the Church learned about the State of Missouri Scrap Tire Grant Program, which provides reimbursement grants for nonprofit organizations to purchase rubber pour-in-place playground surfaces made from recycled tires. Pet. App. 102a. The state funds the program through a fee imposed on the sale of new tires. *See* Mo. Stat. § 260.273(6)(2). Anyone, including religious organizations and their members, who buys a new tire pays this fee. *Id.* The state uses the program to reduce the number of used tires in landfills and illegal dump sites and to foster children's safety. Pet. App. 86a-88a. The DNR administers the Scrap Tire Grant Program. Pet. App. 89a.

Desiring to enhance the safety and accessibility of The Learning Center's facilities, Trinity Lutheran submitted an application for a scrap tire grant to resurface its playground. The application is detailed and requires, among other things, a description, a plan, a budget for the project, a media plan for advertising the benefits of recycling, and an education plan to teach students the benefits of recycling. Pet. App. 120a-126a.

The DNR ranks each application for the Scrap Tire Grant Program because it only awards a certain number of grants per year based on the amount of money it collects from the fee imposed on retail tire sales. Pet. App. 86a-87a, 103a. The DNR criteria for ranking applications are entirely secular and neutral. They include, among other things, whether the application describes the project in adequate detail, includes quotes from at least three scrap tire vendors, and has a detailed plan for installation. *See* DNR Publication 2425, *available at* http://dnr.mo.gov/pubs/pub2425.htm (last visited April 7, 2016), *reprinted in* Addendum to Brief at 1a-19a. A complete list of the criteria is contained in the Addendum at 9a-19a.

The DNR, though, publishes a "Notice to religious based organizations" in which it closes the door to any potential applicants who are religious. On its face, the Notice applies to all religious organizations and states:

> Due to a Missouri Supreme Court ruling, religious based organizations may be eligible

for a grant if:

> 1. The applicant is not owned or controlled by a church, sect or denomination of religions and the grant would not directly aid any church, sect or denomination of religion.
>
> 2. The applicant's mission and activities are secular (separate from religion; not spiritual) in nature.
>
> 3. The grant will be used for secular (separate from religion; not spiritual) purposes rather than for sectarian (denominational, devoted to a sect) purposes.

Addendum at 2a-3a.

Trinity Lutheran submitted an application in 2012. Pet. App. 120a-151a. The DNR received forty-four applications that year. Pet. App. 154a. Using its neutral scoring criteria, the DNR ranked the Church's application fifth out of the forty-four applications submitted. *Id.* The DNR awarded fourteen grants that year but denied Trinity a scrap tire grant solely because it is a church. *Id.*

The DNR notified the Church by letter, which explained:

> [A]fter further review of applicable constitutional limitations, the department is unable to provide this financial assistance directly to the church as contemplated by the grant application. Please note that Article I, Section 7 of the Missouri Constitution specifically provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion...."

Pet. App. 152a-153a.

B. Procedural Background

Trinity Lutheran filed a complaint in the U.S. District Court for the Western District of Missouri on January 25, 2013, alleging that the DNR's policy of denying scrap tire grants to churches violated the Free Exercise, Equal Protection, Free Speech, and Establishment Clauses of the First and Fourteenth Amendments to the United States Constitution, as well as the Missouri Constitution, Article I, § 7. Pet. App. 97a-119a. Trinity Lutheran's complaint was an as-applied challenge, focusing on the DNR policy's application to the church. Trinity Lutheran did not bring a facial challenge to the Missouri Constitution, Article I, § 7.

The district court dismissed Trinity Lutheran's complaint as matter of law with prejudice. Pet. App. 34a-35a. It rejected the church's free exercise claim, reasoning that the Scrap Tire Grant Program involved a direct payment of funds to a sectarian

institution that raised "antiestablishment concerns that are at least as comparable to those relied on by the Court in *Locke* [*v. Davey*, 540 U.S. 712 (2004)]." Pet. App. 54a. This Court held in *Locke* that the State of Washington could deny a scholarship to a student undergoing religious training to be a member of the clergy without violating the Free Exercise Clause. *Id.* The district court cited *Locke* for the proposition that Trinity Lutheran's failure to state a violation of the Free Exercise Clause meant that its "Equal Protection claim must also be dismissed." Pet. App. 69a. The District Court also denied Trinity Lutheran's motion for leave to amend the complaint, ruling that, as a matter of law, any amendment would be futile. Pet. App. 83a.

Trinity Lutheran appealed to the Eighth Circuit, which issued a divided panel opinion affirming the district court's dismissal of the church's Complaint as a matter of law. Pet. App. 1a-31a. The panel opinion incorrectly characterized Trinity Lutheran's Complaint as a facial attack on Article I, § 7, of the Missouri Constitution, Pet. App. 6a, despite the fact that the Complaint brought an as-applied challenge and explicitly stated so several times, *see, e.g.* Pet. App. 106a, 111a, 112a (alleging "Defendant['s] ... unconstitutional application of" Article I, § 7); Pet. App. 109a, 110a (challenging "Defendant's actions in unconstitutionally enforcing [Article I, § 7] by denying Plaintiff's grant application"). The Complaint further requested limited relief that applied only to Trinity Lutheran. *See* Pet. App. 116a (requesting declaration that the DNR's denial of its grant application was unconstitutional); *id.*

(requesting injunctive relief only to prohibit the DNR from denying Trinity Lutheran's participation in the grant program); *id.* (requesting the court "[d]eclare that [Article I, § 7] was unconstitutional as applied to deny Plaintiff's 2012 grant application"). Judge Gruender, in dissent, noted the panel majority's error by pointing out that Trinity Lutheran did not bring a facial challenge to the Missouri Constitution. *See* Pet. App. 24a.

The Eighth Circuit panel majority held that the exclusion of religious organizations from the Scrap Tire Grant Program was justified under *Locke* because there was no "break in the link" between state funds and religion. Pet. App. 10a. The Eighth Circuit was concerned about "the direct grant of public funds to churches, another of the 'hallmarks of an 'established' religion,'" regardless of the secular use to which those funds are put. *Id.* Like the district court, the Eighth Circuit panel majority cited *Locke* for the proposition that "the absence of a valid [f]ree [e]xercise claim" required the dismissal of Trinity Lutheran's equal protection claim as well. Pet. App. 12a.

Judge Gruender dissented because he viewed this Court's reasoning in *Locke* as showing that "'Trinity Lutheran has sufficiently pled a violation of the Free Exercise Clause as well as a derivative claim under the Equal Protection Clause." Pet. App. 23a. Judge Gruender correctly noted that "*Locke* did not leave states with unfettered discretion to exclude the religious from generally available public benefits." Pet. App. 26a. And he explained that "[i]f

giving the Learning Center a playground-surfacing grant raises a *substantial* antiestablishment concern, the same can be said for virtually all government aid to the Learning Center, no matter how far removed from religion that aid may be." Pet. App. 29a.

Trinity Lutheran filed a motion for rehearing en banc that was denied by an equally divided court. Pet. App. 32a-33a. This Court granted review on January 15, 2016. On February 9, 2016, this Court extended the deadline to file the joint appendix and petitioner's brief on the merits until April 14, 2016.

SUMMARY OF ARGUMENT

The DNR's categorical exclusion of religious daycares and preschools from the Scrap Tire Grant Program is discrimination based on religious status that violates the Free Exercise and Equal Protection Clauses. It is not neutral nor is it generally applicable for the state to impose special burdens on non-profit organizations with a religious identity and doing so cannot survive strict scrutiny. Moreover, the Missouri state constitution's antiestablishment concerns cannot trump the United States Constitution's guarantees of free exercise of religion and equal protection to all citizens. Excluding Trinity Lutheran from the Scrap Tire Program here exhibits an undeniable hostility to religion that offends the Constitution's essential mandate of religious neutrality.

The Eighth Circuit strayed by forcing this case

within the confines of *Locke v. Davey*. Trinity Lutheran sought to participate in a generally available public benefit program that provides recycled rubber flooring to protect children from cuts and bruises on the playground. *Locke* rejected a free exercise challenge to compel a state to fund the religious training of clergy. This case is as far from *Locke* as one can conceive.

ARGUMENT

I. The DNR's categorical exclusion of religious organizations from the Scrap Tire Grant Program violates the Free Exercise Clause.

The DNR's application of Missouri Constitution, Article I, § 7, to categorically exclude religious organizations from the Scrap Tire Grant Program based solely on their religious status violates the Free Exercise Clause. The DNR's policy exhibits hostility to religion by singling out and excluding religious institutions solely because of who they are. Thus, it is neither neutral nor generally applicable.

A. The DNR's categorical exclusion of religious organizations is religious status discrimination.

It is well-established that the Free Exercise Clause prevents government from "impos[ing] special disabilities on the basis of ... religious status." *Employment Div., Dep't. of Human Resources v. Smith*, 494 U.S. 872, 877 (1990). This

Court has consistently invalidated exclusions based on religious status or identity. *McDaniel v. Paty*, 435 U.S. 618 (1978), for instance, invalidated a Tennessee statute that barred ministers of the Gospel and priests from serving as delegates to the state's constitutional convention. Tennessee justified the exclusion the same as Missouri does here as ensuring the "separation of church and state." *Id.* at 622. In *McDaniel*, members of this Court agreed that the exclusion of clergy was unconstitutional religious status discrimination. The plurality opinion, for example, reasoned that "[t]he Tennessee disqualification operates against McDaniel because of his *status* as a 'minister' or 'priest.'" *Id.* at 627. And Justices Brennan and Marshall agreed that "the provision ... establishes a religious classification—involvement in protected religious activity—governing the eligibility for office, which I believe is absolutely prohibited." *Id.* at 631-32. (Brennan, J., concurring).

The law at issue in *McDaniel* interfered with free exercise because it conditioned a generally available public benefit, eligibility for office, on the forswearing of certain religious status. *Id.* at 633. Justice Brennan concluded that such an "exclusion manifest[ed] patent hostility toward, not neutrality respecting, religion." *Id.* at 636. He explained that "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *Id.* at 639. Justice Stewart agreed because he reasoned that "Tennessee ... penalized an individual for his religious status—for what he is and believes in—rather than for any

particular act generally deemed harmful to society." *Id.* at 643 n.*.

Tennessee closed the door of public service to McDaniel solely based on who he was and what he believed. He was barred from full participation in the political life of the community because of his religious identity. Missouri does the same thing here by excluding Trinity Lutheran from the Scrap Tire Program, even though its application ranked fifth on the merits out of forty-four submitted, simply because it is a church.

Similarly, in *Torcaso v. Watkins*, 367 U.S. 488 (1961), this Court invalidated a state requirement that a notary public must profess a belief in the existence of God to hold office. Such a requirement "set[] up a religious test which ... bar[red] every person who refuses to declare a belief in God from holding a public 'office of profit or trust' in Maryland." *Id.* at 489-90. This Court explained that: "The power and authority of the State of Maryland thus is put on the side of one particular sort of believers—those who are willing to say they believe in 'the existence of God.'" *Id.* at 490. The requirement to profess a belief in God was discrimination based on religious status: those who believed in the existence of God could hold office while those who did not were prohibited. This Court invalidated this religious classification as an unconstitutional invasion of Torcaso's "freedom of

belief and religion." *Id.* at 496.[1]

More recently, this Court explained that *McDaniel* and *Torcaso* stand for the proposition that "[t]he government may not ... impose special disabilities on the basis of religious views or religious status." *Smith*, 494 U.S. at 877. It has thus been clear for decades that "a law targeting religious beliefs as such is never permissible." *Lukumi*, 508 U.S. at 533 (citing *McDaniel*).

The DNR imposes a special disability on religious status by categorically excluding religious organizations from a program intended to provide recycled rubber playground flooring that protects children as they play. Just as states did in *McDaniel* and *Torcaso*, the DNR here excludes Trinity Lutheran solely because of who it is. This kind of status-based discrimination is particularly odious because it disadvantages an entire group of citizens based solely on their identity regardless of the merits, thereby penalizing their religious faith. Here, the DNR closes the door to all religious daycares even if their inclusion would not threaten any legitimate state antiestablishment interest and instead would further the purely secular objectives of the program. This highlights the discrimination and lack of neutrality perpetrated in this case.

The prohibition against religious status discrimination is a constant theme found

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[1] Justices Brennan, Marshall, and Stewart concurred in the judgment in *McDaniel* based on their belief that *Torcaso* controlled. *See* 435 U.S. at 632, 642.

throughout this Court's precedent. Justice O'Connor summed up that principle by noting that "the Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring).

At other points, the Court has described its precedent as following a general guiding principle of neutrality toward religion that does not allow for discrimination against or classification based on religious status. In *Grumet*, 512 U.S. at 698 (plurality opinion), this Court explained that "religious people (or groups of religious people) cannot be denied the opportunity to exercise the rights of citizens simply because of their religious affiliations or commitments, for such a disability would violate the right to religious free exercise." *See also id. at* 696 ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion...."); *Lukumi*, 508 U.S. at 542 ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment.'") (quoting *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring)); *Sherbert v. Verner*, 374 U.S. 396, 409 (1963) (noting that the holding in that case reflected the "governmental obligation of neutrality in the face of religious differences."); *Sch.*

Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality"); *see also Walz v. Tax Comm'n.*, 397 U.S. 664, 669 (1970) (describing the Religion Clauses as pursuing a governmental course of "benevolent neutrality" toward religion); *Marsh v. Chambers*, 463 U.S. 783, 802 (1983) ("The First Amendment mandates governmental neutrality between religion and nonreligion."); *accord* Laycock, *Theology, Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 210 (2003) ("[F]irst and foremost, *Smith-Lukumi* is about objectively unequal treatment of religious and analogous secular activities."). The Court has consequently rejected all government attempts "to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 248 (1990) (quoting *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring)).

The DNR's religious status discrimination here conjures up all the evils this Court has condemned and invalidated in the past. It not only imposes special disabilities on the basis of religious status, *see Smith*, 494 U.S. at 877, but also unconstitutionally conditions participation in the life of the community on giving up a religious practice, *see McDaniel*, 435 U.S. at 626. Practically speaking, it requires religious adherents to choose between their religious beliefs and receiving a

generally available public benefit. *See Hobbie*, 480 U.S. at 136 ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, *or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs*, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.") (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981)) (emphasis added); *accord Sherbert*, 374 U.S. at 398. The DNR, quite simply, "imposes ... religious tests on [Missouri's] citizens, sorts ... them by faith, and permits ... exclusion based on belief." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1845 (2014) (Kagan, J. dissenting).

This Court has been quick to invalidate measures that engage in status-based discrimination not just under the Free Exercise Clause but also in other constitutional contexts. *See Lukumi*, 508 U.S. at 543 (collecting parallel First Amendment cases); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2230 (2015) (questioning the validity of "[s]peech restrictions based on the identity of the speaker"); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 350 (2010) ("[T]he First Amendment generally prohibits the suppression of political speech based on the speaker's identity."); *Zelman v. Simmons-Harris*, 536 U.S. 639, 654 n.3 (2002) (describing programs that differentiate "based on the religious status of beneficiaries" as violating "the touchstone of

r.eutrality under the Establishment Clause"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands ... that all persons similarly situated should be treated alike."); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category").

Indeed, this Court's free speech caselaw regarding public fora is particularly analogous. In *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), for example, this Court invalidated the university's exclusion of a religious student group from a student activity fee program. The only reason the university prohibited the student group from receiving funding was because of its religious viewpoint. *Id.* at 830. But this Court held that exclusions from a neutral public forum based on the religious viewpoint of the speaker violate the Free Speech Clause. *Id.* at 837; *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (requiring school to allow religious groups access to school facilities on equal terms with other groups); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (requiring use of school facilities on neutral basis as to a religious group). This equal access principle in the free speech arena correlates to the neutrality principle under the Free Exercise Clause.

Justice Kennedy expressed the overarching

principle at stake in this case just two terms ago by recognizing that "[f]ree exercise ... means... the right to ... establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). It is simply impossible to establish Trinity Lutheran's religious identity when, as Missouri has done here, the state excludes it from participation in the life of the community solely based on its religious status.

Four members of this Court recently underscored the importance of the government maintaining religious neutrality. They explained that "[a] Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person ... seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American." *Town of Greece*, 134 S. Ct. at 1841 (Kagan, J., dissenting). But the DNR did not consider Trinity's application to receive a neutral benefit of citizenship on an evenhanded basis. It rejected Trinity's application outright—despite that request's undeniable secular merits—because of the daycare's religious identity.

Such religious status discrimination eschews a course of neutrality in favor of rank hostility to religion. In this case, that hostility is even more pronounced because, as discussed *infra* in Part III, the Scrap Tire Grant Program does not implicate

any valid state establishment concern.

B. The DNR's categorical exclusion of religious organizations is not neutral or generally applicable.

This Court's *Smith* decision provides space for neutral, generally applicable restrictions under the Free Exercise Clause, but discrimination based on religious status is not neutral in any sense of the word. Nor is such an exclusion generally applicable since it only excludes religious actors. A law that is either not neutral or not generally applicable must satisfy strict scrutiny. *See Lukumi*, 508 U.S. at 531. "Neutrality and general applicability are interrelated, and ... failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* That is the case here.

Indeed, this case is akin to *Lukumi* where this Court struck down the City of Hialeah's ordinances on animal killing because they were not religiously neutral. The ordinances specifically targeted the Santeria religion's practice of animal sacrifice but left virtually all other animal killing unregulated. *See Lukumi*, 508 U.S. at 536 ("The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice ...."). After discussing the law's real operation, this Court concluded that the Hialeah ordinances were not neutral because it "in a selective manner impose[d] burdens only on conduct motivated by religious belief" and thus violated the "rights guaranteed by the Free Exercise Clause." *Lukumi*, 508 U.S. at 543.

There is no such pretense or gerrymander here. In fact, the Court does not have to look beyond the DNR's letter denying Trinity Lutheran's application to participate in the Scrap Tire Grant Program, regardless of its high score on the merits, to decide that the program is not being administered in a neutral manner. Quite to the contrary, the DNR applied an express categorical exclusion based solely on Trinity Lutheran's religious status.

Nor is the DNR's exclusion generally applicable. It applies only to religious institutions. Every secular daycare and other eligible nonprofit organization can participate in the program. A bar *only* against religious entities is a far cry from the "across-the-board criminal prohibition" in *Smith*, 494 U.S. at 884. The DNR's exclusion applies only to daycares and preschools owned and operated by a religious entity. It has no application to daycares motivated by any other philosophy, despite the fact that their programs may be functionally identical to those operated by a church.

In short, there is no plausible argument that the DNR's exclusion of Trinity Lutheran is neutral or generally applicable. Removing the barrier to the church's equal participation in the political community will not result in a constitutional anomaly like the one this Court rejected in *Smith*, where removing a general criminal prohibition on drug use would have granted believers preferential treatment. *See Smith*, 494 U.S. at 886. It will simply reestablish the constitutional norm of equal treatment that the Free Exercise Clause guarantees

to all citizens. *See id.*

II. The DNR's religious exclusion from the Scrap Tire Grant Program employs a suspect classification that violates the Equal Protection Clause.

Categorically excluding religious institutions from the Scrap Tire Grant Program violates the Equal Protection Clause because it employs a suspect classification that cannot satisfy strict scrutiny.

The DNR undeniably classifies applicants to the Scrap Tire Grant Program by religion. In fact, it explicitly rejected Trinity Lutheran's grant application solely because it is a "church." Pet. App. 152a-153a. There is thus no question that DNR applies Article 1, § 7, of the Missouri Constitution to categorically exclude all "church[es], sect[s] or denomination[s] of religion" from the Scrap Tire Grant Program, Pet. App. 152a-153a, a religious classification that is inherently suspect. *See, e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (noting that a law or regulation triggers strict scrutiny under the Equal Protection Clause if it "is drawn upon inherently suspect distinctions such as ... religion").

Moreover, Trinity Lutheran is undoubtedly similarly-situated to other recipients of scrap tire grants. The DNR scored Trinity Lutheran's application fifth out of forty-four applications submitted in 2012 and would have granted the

application but for the fact that Trinity Lutheran is a church. *See* Pet. App. 152a-154a. Because the DNR was poised to give Trinity a grant absent its religious identity, there is no question that the church is similarly-situated to other applicants who the DNR allowed to participate in the Scrap Tire Grant Program on a neutral basis. In fact, on the merits, the DNR scored Trinity Lutheran's application higher than thirty-nine other would-be grant recipients. Yet it turned Trinity Lutheran away based solely on its religious status.

This flies in the face of the Equal Protection Clause's "direction that all persons similarly situated should be treated alike." *Cleburne,* 473 U.S. at 439. Yet the DNR treats religious organizations differently on the basis of an inherently suspect classification—religion. When the government treats similarly situated entities differently solely because of their religious status, it must satisfy the rigors of strict scrutiny. *See Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (recognizing that laws that "classify along suspect lines like ... religion" are subject to strict scrutiny).

Indeed, this Court generally treats religious classifications as "presumptively invidious." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). This is so because "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as *individuals*, not as simply components of a racial, religious, sexual or national class." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (internal

marks omitted), *overruled by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

This Court's decision in *Locke* is not to the contrary. The Eighth Circuit cited *Locke v. Davey* for the proposition that "in the absence of a valid Free Exercise claim, Trinity['s] Equal Protection Claim is governed by rational basis review" and held that "[t]he high wall of separation between church and state created by Article I, § 7," satisfies that low threshold. Pet. App. 12a; *see also Locke*, 540 U.S. at 720 n.3 ("Because we hold ... that the program is not a violation of the Free Exercise Clause, however, we apply rational-basis scrutiny to [Davey's] equal protection claims. For the reasons stated herein, the program passes such review.") (internal citations omitted).

But *Locke* did not lay down a rule that any time equal protection and free exercise claims arise out of the same set of facts, the strength of the former is always coequal with the latter. To the contrary, *Locke's* brief discussion of equal protection was limited to a few sentences in a footnote and applies only to one type of equal protection claim—those based on interference with a fundamental right. And it is completely unsurprising that the *Locke* Court would judge a fundamental-right claim under rational basis scrutiny after concluding the law did not violate the fundamental right in question.

Importantly, *Locke* cited two cases in support of its holding that because Davey did not establish a free exercise violation, his equal protection claim

was subject to only rational basis review. The first case was *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974). Robison brought a two-pronged challenge under the Equal Protection Clause. He contended that denying educational benefits to conscientious objectors interfered with his fundamental right to the free exercise of religion. *Id.* Robison also argued that conscientious objectors were a suspect class that subjected the classification to strict scrutiny. *Id.* In regard to this fundamental rights claim, the Court stated:

> Unquestionably, the free exercise of religion is a fundamental constitutional right. However, since we hold in Part III, *infra*, that the Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test.

Id.

The Court also rejected Robison's suspect classification claim because conscientious objectors do not constitute a suspect class that triggers strict scrutiny. *Id.* *Robison* thus merely stands for the "obvious principle that if state action does not trigger strict scrutiny under the Free Exercise Clause, it will not trigger strict scrutiny under the fundamental right prong of the Equal Protection Clause, either—but the opinion says nothing at all with regard to a challenge under the suspect classification prong." Susan Gellman, Susan Looper-Friedman, *Thou Shalt Use the Equal*

Protection Clause for Religion Cases (Not Just the Establishment Clause), 10 U. PA. J. CONST. L. 665, 733-36 (2008). Certainly, *Robison* did not hold that laws employing a suspect classification or actually implicating a fundamental right are subject only to rational basis review.

The *Locke* Court also cited *McDaniel v. Paty* for its equal protection holding. But the *McDaniel* plurality opinion said nothing about religion as a suspect class and never evaluated McDaniel's equal protection claim. The sole reference to equal protection in *McDaniel* appears in Justice White's concurrence. 435 U.S. at 643-46. Justice White evaluated that case under the Equal Protection Clause because he believed that seeking elective office was an important right that should subject the statute to careful scrutiny. *Id.* at 644. But his concurring opinion did not address an equal protection claim based on a suspect classification.

Simply put, this Court has never held that a religious suspect classification claim under the Equal Protection Clause rises or falls based on the success of a companion free exercise claim. Instead, this Court has consistently held that suspect classifications based on religious status are "inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a 'suspect class'....." *Plyler*, 457 U.S. at 216.

The religious difference between Trinity Lutheran's daycare and secular daycare operators is the *only* basis for the exclusion here, although they

both seek scrap tire funds to fulfill the state's recycling goals and to provide children a safer area to play. Because the DNR employs a suspect classification, it must satisfy strict scrutiny.

III. The DNR's categorical exclusion cannot withstand the rigors of strict scrutiny.

Under the Free Exercise Clause, the government must show that a law which is either not neutral or generally applicable is justified by a compelling governmental interest and is narrowly tailored to advance that interest. *See Lukumi*, 508 U.S. at 531-32; *see also Smith*, 494 U.S. at 886 n.3 ("Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion"). Likewise, a suspect classification under the Equal Protection Clause must satisfy strict scrutiny. *See Dukes*, 427 U.S. at 303 (holding that a law or regulation triggers strict scrutiny under the Equal Protection Clause if it "is drawn upon inherently suspect distinctions such as ... religion"). The DNR's religious exclusion here fails both prongs of the strict scrutiny analysis, which together comprise "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

A. The DNR has no compelling interest in categorically excluding religious institutions from the Scrap Tire Grant Program.

The DNR asserts that it has a heightened interest in the separation of church and state that is memorialized in Article 1, § 7. The Eighth Circuit also cited this interest as the justification for Trinity Lutheran's categorical exclusion from the Scrap Tire Grant Program even though the secular merits of its application ranked near the top. *See* Pet. App. 5a (citing *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376, 383-84 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974) (noting Missouri's "long history of maintaining a very high wall between church and state")).

But this Court has already rejected the DNR's asserted categorical compelling interest. In *Widmar v. Vincent*, 454 U.S. 263, 278 (1981), the University of Missouri at Kansas City opened its facilities for the activities of registered student groups but excluded one religious student group who wanted to use the facilities for "religious worship and religious discussion." *Id.* at 265. This Court invalidated the state's religious exclusion under the Free Speech Clause, holding that the university had created an open forum for student groups and its "exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the university is unable to justify this violation under applicable constitutional standards." *Id.* at 277.

In *Widmar*, the university, like the DNR here, attempted to justify its exclusion of a religious group by arguing that it was avoiding a federal Establishment Clause violation and also that it was attempting to achieve the greater degree of separation of church and state required by the Missouri Constitution, including the provision the DNR cites here—Article I, § 7. This Court rejected both arguments. It first noted, under the federal Establishment Clause, that an open forum policy "including nondiscrimination against religious speech" had a secular purpose and avoided entanglement with religion. *Id.* at 271-72.

The *Widmar* Court then rejected the argument that opening the speech forum to the religious student group would have the primary effect of advancing religion. *Id.* at 272. It noted that the forum was available to "a broad class of nonreligious as well as religious speakers" and that the "provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Id.* at 274. "If the Establishment Clause barred the extension of general benefits to religious groups," this Court explained that "'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" *Id.* at 274-75 (quoting *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 747 (1976) (plurality opinion)).

Just as importantly, the *Widmar* Court rejected the university's antiestablishment interest under Article I, § 7, of the Missouri Constitution—the exact same provision at issue in this case. It explained

that "the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause." *Id.* at 276. Hence, this Court has already determined that Missouri cannot further its state constitutional antiestablishment interest by violating the free exercise rights of its citizens. The DNR's attempt to invoke the Missouri state constitution to justify violating Trinity Lutheran's First Amendment rights must therefore fail.

Like the University in *Widmar*, which tried to exclude a religious group from an open forum accessible to all, the DNR attempts to exclude Trinity Lutheran from a neutral and generally available public benefit program. But, as this Court concluded in *Widmar*, including religious citizens in a neutral benefit program equally available to all does not compromise any antiestablishment principle and cannot constitute a government interest "of the highest order." *Thomas*, 450 U.S. at 718 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

In short, there cannot be a compelling interest in the "separation of church and state" if there is no possibility of a breach by treating religious citizens the same as everyone else. Where (1) the criteria for inclusion in the Scrap Tire Grant Program is entirely secular, (2) the factors used to select grant recipients are wholly secular and, perhaps most importantly, (3) the aid itself—rubber playground surfacing material—is devoid of any religious

content and (4) cannot possibly be diverted to a religious use, that is plainly true. It is certainly difficult to imagine a more secular program than using recycled tire material to prevent children from getting hurt as they run, climb, and swing on the monkey bars.

Moreover, it is not rational to categorically exclude churches from neutral and otherwise generally available public benefit programs when their objectives and practical impact are entirely secular. Police and fire departments, for instance, protect churches as well as secular businesses to promote public safety and the general welfare. Cities build and repair streets and sidewalks in front of churches and secular organizations alike to facilitate transportation, commerce, and community. Even though churches are undeniably "aided" to some degree by these government programs, these benefits have nothing to do with religion and "aid" all citizens equally no matter what philosophy (secular or religious) animates their lives.

It is simply irrational for the DNR to exclude religion in the name of achieving a pinnacle degree of church-state separation in these circumstances. All the DNR is really accomplishing by excluding religious institutions from a neutral benefit program available to all is treating religious entities worse than everyone else. The DNR's exclusion thus represents "a brooding and pervasive devotion to the secular and ... [an] active hostility to the religious," which is "prohibited by [the Constitution]." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring)

(internal marks omitted); *see also Rosenberger*, 515 U.S. at 846 (cautioning against "fostering a pervasive bias or hostility to religion"). The DNR simply has no legitimate, let alone compelling, interest in excluding all religious organizations from participating in the Scrap Tire Grant Program.

B. Any legitimate interest the DNR may have is not advanced by the least restrictive means available.

The DNR certainly cannot prove that a categorical exclusion of religion advances any legitimate interest it may possess in the least restrictive manner available. If the government's interest can be "achieved by narrower [laws] that burden[] religion to a far lesser degree," *Lukumi*, 508 U.S. at 546, then a law is not narrowly tailored. Laws that, for instance, sweep too much protected conduct into their prohibitory reach are not narrowly tailored.

In *Lukumi*, this Court found the ordinances at issue not to be narrowly tailored because they were overbroad. *See id.* at 546 (holding that the city's interests "could be achieved by narrower ordinances that burdened religion to a far lesser degree"). The City, for example, raised a legitimate governmental interest in preventing improper disposal of animals that had been killed. But this Court noted that "[i]f improper disposal, not the sacrifice itself, is the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage." *Id.* at 538.

Similarly, in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991), this Court held that the "Son of Sam" statute was not narrowly tailored in light of the state's asserted interest in compensating crime victims because it applied to a "wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated." *Id.* at 122-23; *see also First Nat. Bank v. Bellotti*, 435 U.S. 765, 794-95 (1978) (holding that a statute prohibiting corporations from making contributions or expenditures to influence the vote on referendum proposals was not narrowly tailored to advance the asserted interest in protecting shareholders because it prohibited contributions or expenditures made even with the unanimous consent of shareholders).

The overinclusiveness of the DNR's exclusion is apparent because it extends to all religious organizations regardless of any conceivable impact on the state's asserted interest. Indeed, such a blanket restriction bears no connection to any imaginable interest other than denying the religious access to programs designed to further basic public safety. Given that the Scrap Tire Grant program (absent the religious exclusion) is entirely neutral and that Trinity Lutheran's participation in that program would serve the State's recycling and safety goals equally well, the DNR simply has no legitimate basis for excluding the church.

Yet the DNR wields an axe when a scalpel would

suffice. This is not a case in which the state allows money to flow to recipients to use as they wish with minimal oversight or restrictions. The DNR, for instance, utilizes strict record-keeping and reporting requirements. *See* Pet. App. 92a-96a. Grant payments are only *reimbursements* for payments already made by the recipient and they do not cover the total cost of the project. *Id.* at 94a; *see also* Addendum at 5a-6a. And the DNR specifies that "[g]rant recipients will be reimbursed only after the playground scrap tire surface material is installed and verified by a department inspector and all required documentation is submitted and approved by the department project manager." Addendum at 5a. Furthermore, the DNR has strict accountability requirements for grant funds. Pet. App. 95a-96a. The DNR thus knows full well how to ensure the fulfillment of its programmatic goals while preserving any antiestablishment interest it may have in providing generally available public benefits to religious organizations. A categorical ban on religion is merely an overbroad and unconstitutional restriction on the ability of the faithful to participate on equal terms in public life.

The DNR's categorical exclusion of churches violates the Free Exercise and Equal Protection Clauses because it is status based discrimination that does not serve a compelling interest by the least restrictive means available to the State. Accordingly, this Court should reverse the judgment of the Eighth Circuit.

IV. *Locke v. Davey* does not sanction religious status discrimination.

This Court's decision in *Locke v. Davey* does not establish that states can engage in religious status discrimination as they please. In *Locke*, this Court held that the State of Washington did not violate the Free Exercise Clause when it denied scholarship funds for students pursuing a degree in devotional theology. 540 U.S. at 715. The Court held that excluding "training for religious professions" fell within the "play in the joints" between state actions "permitted by the Establishment Clause but not required by the Free Exercise Clause" based on unique historical concerns related to "procuring taxpayer funds to support church leaders." *Id.* at 718-19, 721-22.

This Court's decision in *Widmar*, however, establishes the general rule that antiestablishment interests under a state constitution cannot violate the rights guaranteed by the United States Constitution. 454 U.S. at 276. The *Locke* decision must therefore be read in concert with *Widmar*. If anything, *Locke* is a narrow exception to *Widmar's* general rule based on a unique historical concern—state funding for the religious training of clergy—that has no application in a case like this that deals with installing rubber playground flooring to protect children as they play. In *Locke*, this Court was concerned by *what* the scholarship funds were going to be used for—the devotional training of clergy—not the identity of those *who* were using the money. But Trinity Lutheran's religious identity was the sole

basis for the DNR's exclusion here. *Locke* simply has no application in that context.

A. Trinity Lutheran does not seek funding for an essentially religious endeavor.

The cardinal fact in *Locke* was that Davey was seeking funding for an "essentially religious endeavor," the devotional training of clergy. *Id.* at 721. The Court could "think of few areas in which a state's antiestablishment interests come more into play" because "procuring taxpayer funds to support church leaders ... was one of the hallmarks of an 'established' religion." *Id.* at 722. The unique historical concerns related to funding the devotional training of clergy formed the backbone of the *Locke* decision.

Critically, the *Locke* Court explicitly warned that "the only interest at issue" in that case was "the State's interest in not funding the religious training of clergy. Nothing in [the Court's] opinion suggests that the State may justify any interest that its 'philosophical preference' commands." *Id.* at 722 n.5. *Locke*, "[a]s written, [thus] applies only to funding the training of clergy" and nothing more. Douglas Laycock, *Theology, Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. at 161-62.

In this case, Trinity Lutheran does not seek funding for an essentially religious endeavor. It

merely wishes to participate in a generally available reimbursement program to obtain recycled scrap tires that are transformed into a pour-in-place rubber playground surface that protects children's physical safety. The surface that children play on as they enjoy recess is about as far as one can get from the devotional training of clergy.

Indeed, the Scrap Tire Program is entirely secular from top to bottom. The criteria used to judge grant applications are completely secular. *See* Addendum 9a-19a. Scrap tire material is not, and cannot be, transformed into anything remotely religious, but instead is used in a neutral way to cushion children as they play. As Judge Greunder noted below in this case: "[S]choolchildren playing on a safer rubber surface made from environmentally friendly recycled tires has nothing to do with religion." Pet. App. 29a. The *Locke* Court's concern regarding the devotional training of clergy simply has no place here.

Regardless, the Eighth Circuit attempted to fit a square peg in a round hole by characterizing Trinity's Complaint as "seek[ing] to compel the direct grant of public funds to churches [which is] another of the 'hallmarks of an 'established' religion.'" Pet. App. 10a (citing *Locke*, 540 U.S. at 722). Yet this Court has never set forth such a simplistic rule that any and all generally available public benefits that flow to a church create an antiestablishment problem. Obviously, providing police, fire, and rescue service to churches on equal terms with other buildings is no "hallmark" of an

established religion. *Locke*, 540 U.S. at 722. And it matters not if the service is provided through local subsidization; for example, through the waiver of ambulance bills as occurs in nearby Fairfax County, Virginia. *See* Fairfax County Fire and Rescue Department Emergency Ambulance Service Billing, *available at* www.fairfaxcounty.gov/fr/ems_billing/ems_transport_flyer-largeprint.pdf (subsidizing 911 ambulance services for county residents) (last visited April 11, 2016). The selective denial of such services, or assessing special charges based on religious identity, would be rank discrimination.

Instead, programs, like the one in this case, that evenhandedly allocate a secular benefit for secular use to a broad class of recipients generally do not implicate a religious establishment even if they flow directly to a religious institution. In *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 656–59 (1980), for instance, this Court upheld a program in which aid flowed directly to a religious school because "there d[id] not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with state-furnished materials have no such effect." *See also Roemer*, 426 U.S. at 736 (upholding direct grants to religious institutions because of prohibition against using the grant for sectarian purposes); *Hunt v. McNair*, 413 U.S. 734, 736, 744-45 (1973) (upholding issuance of revenue bonds for benefit of religious college where there was a prohibition on use of funds

for buildings or facilities used for religious purposes).

In fact, a contrary rule would mean, for example, that a government could waive express toll lane charges for high occupancy vehicles (HOV), yet exclude church buses. *See, e.g.* Toll-free travel on the 95/495 Express Lanes, https://www.ezpassva .com/EZPages/New-Flex.aspx (describing a Virginia program that allows for toll charges to be waived for high occupancy vehicles) (last visited April 11, 2016). But religious organizations should not be discriminated against solely because of their religious identity when they participate in neutral and generally available public benefits that apply equally to everyone.

Recycled scrap tire material is not amenable in any way to religious purposes. It is wholly secular. There is no way for Trinity Lutheran to convert rubber protecting children from injury into the advancement of religious doctrines. As the plurality noted in *Mitchell v. Helms*, 530 U.S. 793, 824 (2000), "[t]he risk of [an Establishment Clause violation] is *less* when the aid *lacks* content, for there is no risk (as there is with books) of the government inadvertently providing improper content." Scrap tire material has no content and is a far cry from even the aid for instructional materials approved in *Mitchell*, or the provision of government-paid teachers to religious schools upheld in *Agostini v. Felton*, 521 U.S. 203, 230-31, 234-35 (1997).

In short, there are simply no legitimate antiestablishment concerns that could place this

case within *Locke's* bounds. Both the Eighth Circuit and the DNR agree that providing a scrap tire grant to Trinity Lutheran would not violate the federal Establishment Clause. *See* Pet. App. 9a ("[I]t now seems rather clear that Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire grant program without violating the Establishment Clause."); Dist. Ct. Tr. of Sept. 19, 2013, at 6-7 (argument of DNR's attorney conceding that giving a scrap tire grant to a religious institution would not violate the Establishment Clause). And this case involves no inherently religious activity. Yet both lower courts dismissed Trinity Lutheran's free exercise and equal protection claims because they wrongly concluded that *Locke* controlled based on the fact that aid would flow directly to a church.

But the direct flow of aid to a religious entity was not the issue in *Locke*, which addressed only state funding of "a degree in devotional theology," which "[t]rain[s] someone to lead a congregation," "an essentially religious endeavor." 540 U.S. at 719, 721. This Court was simply concerned about *what* the aid was being used for—the devotional training of clergy—not *who* was using the aid and how that aid flowed. The DNR, though, justifies a categorical exclusion from the Scrap Tire Grant Program solely based on *who* obtains the benefit—a church. Such discrimination based on religious identity violates the Free Exercise and Equal Protection Clauses.

B. The DNR's exclusion exhibits hostility to religion.

This Court noted in *Locke*, 540 U.S. at 720, that the state's disfavor of religion in the scholarship program was "far milder" than the kind of hostility to religion invalidated in *Lukumi*, 508 U.S. at 520. For example, the program in *Locke* did "not deny to ministers the right to participate in the political affairs of the community. And it d[id] not require students to choose between their religious beliefs and receiving a government benefit." *Id.* (internal marks and citations omitted). The *Locke* Court also noted that the scholarship program at issue went "a long way toward including religion in its benefits." *Id.* at 724. Under the State of Washington's program, students could still attend religious schools and could use their scholarship money to fund anything but devotional theology classes. *Id.*

In stark contrast, the DNR categorically excludes religious organizations from receiving reimbursement for a rubber playground surface that merely protects children as they play. This is hostility to religion pure and simple, which inflicts its own unique harm. Like the exclusion in *McDaniel v. Paty*, which this Court cited in *Locke* as an example of unconstitutional discrimination, the DNR's blanket ban denies religious organizations the right to "participate in the [life] ... of the community" on equal terms. *Locke*, 540 U.S. at 720.

Churches like Trinity Lutheran are not constitutional lepers. Yet, the only way The

Learning Center could receive a scrap tire grant would be for Trinity Lutheran to disavow its nature as a church or for the preschool to separate from the church. Hence, the DNR unconstitutionally requires applicants to "choose between their religious beliefs and receiving a government benefit." *Locke*, 540 U.S. at 720-21. This religious exclusion wrongfully sends a message that some children are less worthy of protection simply because they enjoy recreation on a playground owned by a church. This is not a mild disapproval of religion but implicates the physical safety of both students and neighborhood kids. And it renders the faithful consummate outsiders to the political community by denying their right to be treated on equal terms with other nonprofit groups.

Religious organizations and their members pay the scrap tire fee when purchasing new tires just like everyone else, but they are uniquely unable to benefit from the program it funds solely because of their religious status. This exclusion denies religious organizations equal treatment and the right to establish their "religious ... self-definition in the political, civic, and economic life of our larger community" for no rational (let alone compelling) purpose. *See Burwell*, 134 S. Ct. at 2785 (Kennedy, J., concurring).

C. Missouri's Article 1, § 7, has a "credible connection" to the religious bigotry exhibited by the Blaine Amendment.

The Court in *Locke* noted that the Washington

constitutional provision at issue was not a Blaine Amendment, nor had Davey "established a credible connection" to a Blaine Amendment. *Id.* at 723. n.7. Accordingly, the *Locke* Court did not consider the anti-Catholic bigotry that resulted in other state constitutional provisions. *Id.*

In contrast, Article 1, § 7, of the Missouri Constitution, to which the DNR pointed in denying Trinity Lutheran's application, has a credible connection to the bigotry of the federal Blaine Amendment. It was enacted in 1875—the exact same year the federal Blaine Amendment was proposed and debated. *See* MO. CONST. art 1, § 7, *available at* http://www.moga.mo.gov/MoStatutes/Consthtml/A010071.html (last visited April 7, 2016); *see also* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 626 n.149 (2003) ("[O]vert anti-Catholic bigotry ... was widespread in late nineteenth century America"). Notably, Article I, § 7, is a strict no aid provision that shares the same grounding in "hostility to the Catholic Church and to Catholics in general" that this Court recognized in *Mitchell*, 530 U.S. at 828 (plurality opinion). And, Article I, § 7's past connection to religious bigotry carries over to the present in the DNR's application of that provision to categorically exclude religious preschools and daycares from the Scrap Tire Program, which constitutes religious status discrimination of the worst kind.

In sum, none of the factors this Court relied

upon in *Locke* are present here. This case is different in all relevant respects. Unlike *Locke*, it involves: (1) a generally available public benefit that is completely secular and that does not involve an inherently religious activity, such as the training of clergy; (2) an unmistakable hostility to religion that is not a mild disfavor of religion; (3) a categorical exclusion of religion that bars religious organizations completely from the program; and (4) a constitutional provision, Article I, § 7, that reflects the bigotry of the Blaine Amendment. *Locke* never sanctioned such a categorical exclusion of religion from an otherwise secular, neutral, and generally available public benefit program that raises no valid antiestablishment concern.

The Court should not allow the DNR to use a state constitutional provision to eviscerate a church daycare's First and Fourteenth Amendment right to participate equally in society without first surrendering its religious character.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals and hold that categorically excluding Trinity Lutheran from the Scrap Tire Grant Program based solely on its religious status constitutes a violation of the church's free exercise and equal protection rights.

Respectfully submitted,

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April 14, 2016

ADDENDUM

ADDENDUM TABLE OF CONTENTS

Playground Scrap Tire Surface Material Grant Application Instructions 1a

MISSOURI DEPARTMENT OF NATURAL RESOURCES PUBLICATION 2425

Missouri Department of Natural Resources

PLAYGROUND SCRAP TIRE SURFACE MATERIAL GRANT APPLICATION INSTRUCTIONS FOR FORM 780-2143

Solid Waste Management Program
fact sheet

12/2014
PUB2425

Division of Environmental Quality
Director: Leanne Tippett Mosby

This fact sheet contains:

- Information on who may apply for playground scrap tire surface material grants.
- A description of playground scrap tire surface material grants.
- The amount of available funding.
- Detailed requirements and procedures for applying for a grant.
- Application instructions.
- Evaluation criteria.
- A list of scrap tire material vendors.
- A Solid Waste Management Region map and list of Solid Waste Management District contacts.

Types of projects eligible for funding upon award under this announcement
Playground projects only.

Who may apply for a playground scrap tire surface material grant?
Public school districts, private schools (depending on status), park districts, nonprofit day care centers, other nonprofit entities and governmental organizations other than state agencies are eligible to submit applications. Privately owned, residential backyard areas, and private in-home day care centers are ineligible.

Assistance is available only for those projects located within the state of Missouri. Applications may come from an individual school within a public school district or individual park within a park district or city/county boundary; however, the department reserves the right to limit the number of grants a school, park district, city/county can receive.

Prior recipients of scrap tire surface material grants are ineligible during this grant cycle unless an expansion to the prior surfaced area is planned or a different location or area will be surfaced. Prior surfaced areas cannot be repaired or upgraded with grant funds.

Notice to religious based organizations
Due to a Missouri Supreme Court ruling, religious based organizations may be eligible for a grant if:

1. The applicant is not owned or controlled by a church, sect or denomination of religions and the grant would not directly aid any church, sect or denomination of religion.
2. The applicant's mission and activities are secular (separate from religion; not spiritual) in nature.
3. The grant will be used for secular (separate from religion; not spiritual) purposes rather than for sectarian (denominational, devoted to a sect) purposes.

Evaluation

Evaluation criteria are used to score all applications. One of the evaluation criterions is specifically used to assist in equitably distributing available funding within the geographic boundaries of Missouri. Additionally, once all grant applications are evaluated and scored should multiple applications receive the same score the department shall break such tie by assigning each application a number and selecting numbers in a random draw until grant funds are exhausted.

Note: The department reserves the right to deny funding to anyone convicted of defrauding the department, has failed to honor a previous contractual agreement or covenant with the department, has substantially failed to meet the minimum performance criteria of a previous project funded by the department due to mismanagement, deception or negligence, or has documented less than satisfactory performance in the administration of a previous department grant.

Information about eligible playground scrap tire surfacing materials

The department is accepting applications that promote the use of recycled scrap tires for playground surface materials. All grant recipients will be required to purchase scrap tire material from manufacturers that use at least 40 percent Missouri generated scrap tires in their surface material. A list of known vendors is provided with these instructions (page 3.). Loose material must be 8" deep, wire free, and properly contained. Mats/tiles and pour-in-place material must be placed on asphalt, concrete, or other suitable surfaces. All surface material projects must conform to the manufacturer's specifications and be approved by the department.

Amount of playground scrap tire surface material funding available

The department plans to provide a total of approximately $150,000 for grants in this grant cycle. Grant applicants requesting mats/tiles or pour-in-place surface material may request up to $20,000 while those grant applicants requesting loose surface material may request up to $10,000. Preference will be given to applicants requesting mats/tiles or pour-in-place surface material.

Financial assistance agreement and reimbursement of allowable expenditures

Playground scrap tire surface material grants are paid on a reimbursement basis. Purchases and expenditures of grant funds cannot occur until a Financial Assistance Agreement (FAA) between the

grant recipient and the department has been signed.

The grant recipient is responsible for making all payments for the project. Reimbursement may then be requested solely for the purchase, vendor installation and delivery of the playground scrap tire surface material. Grant recipients will be reimbursed only after the playground scrap tire surface material is installed and verified by a department inspector and all required documentation is submitted and approved by the department project manager. Failure to comply with project quarterly status reporting requirements will result in a delay or non-reimbursement by the department. The term of all playground scrap tire surface material grants is one year as indicated in the FAA.

Funds for these grants must be appropriated and made available to the department by the Missouri General Assembly. The department then determines the total amount of funds available for grant award during the grant period.

Submission of application

The original and two complete copies of the application and supporting documentation must be submitted to be eligible for evaluation. Ensure the person who is listed as the authorized official signs and dates the application document.

Mailed applications must be postmarked by Friday, Feb. 27, 2015. Hand-delivered applications must arrive at the department by 5 p.m. on Friday, Feb. 27, 2015.

Mail your application to:	**Hand-deliver your application to:**
Missouri Department of Natural Resources	Missouri Department of Natural Resources
Solid Waste Management Program	Solid Waste Management Program
P. O. Box 176	1730 E. Elm St. (Lower Level)
Jefferson City, MO 65102-0176	Jefferson City, MO 65101-0176

Applications will not be accepted via fax or e-mail. Applications and supporting documents received after the deadline indicated above are ineligible for evaluation and funding.

Playground scrap tire surface material vendors

The following is a list of vendors known to the department whose scrap tire material uses at least 40% Missouri tires in their product. The department in no way endorses the services of these businesses but provides this list for your information. The businesses are listed in no specific order. The department assumes no liability or responsibility for the quality of scrap tire material. Applicants should require from the manufacturer that the scrap tire material be free of

foreign material such as protruding metal, loose wire, rocks, wood, etc. The department suggests applicants request samples of the scrap tire material and consult with vendors regarding proper depth, containment, support and site preparation. Because manufacturers use different processes and feed stocks, the scrap tire material from each vendor may vary.

NOTE: If a quote is received from a vendor not on this list it is possible scoring points will be deducted as vendors not provided on this list have not been verified by the department as using at least 40% Missouri tires in their product.

MISSOURI VENDORS

All Inclusive Rec, LLC
P.O. Box 72
Farmington, MO 63640
573-701-9787
573-701-9312 fax
air@allinclusiverec.com

Granuband Macon, LLC
612 Blees Industrial Dr.
Macon, MO 63552
800-800-5350

Entire Recycling, Inc.
13974 US Hwy. 136
Rock Port, MO 64482
660-744-2252
877-209-7345

International Mulch, Co.
1 Mulch Lane
Bridgeton, MO 63044
866-936-8524

S. Bollinger & Associates, LLC
P.O. Box 856
Hillsboro, MO 63050
636-797-5820
636-797-5881
Sbollingerandassociates.com

National Playground Compliance Group
16510 Lancaster Estates
Grover, MO 63040
314-225-7988

KANSAS VENDOR

Rooster Rubber
1720 Wabash Avenue
Kansas City, MO
64127-2505
816-241-6400
816-241-6404 fax
www.roosterrubber.com

Champlin Tire Recycling, Inc.
P.O. Box 445
Concordia, KS 66901
800-295-3345

OTHER

Constructive Playthings
13201 Arrington Road
Grandview, MO 64030
800-448-2972
816-761-8225 fax

SofSurfaces, Inc.
4393 Discovery Line,
P.O. Box 239
Petrolia, Ontario,
Canada
800-263-2363
519-882-2697 fax

Note: All estimates, bids and invoices should include a statement by the vendor regarding the percentage of Missouri tires used in their product(s).

Evaluation Criteria

1. Applicant Profile and Checklist.

15 Points	One original signed and dated application and two complete copies including required supporting documentation (e.g., non-profit documentation, if applicable) and a completed and signed checklist were submitted.
10 Points	One original signed and dated application and two complete copies including supporting documentation with the exception of the non-profit documentation, if applicable, and a completed and signed checklist were submitted.
Ineligible	The required original signed and dated application and two complete copies including required supporting documentation with the exception of the non-profit documentation and a completed and signed checklist **were not** submitted.

2. Location Profile.

15 Points	This portion of the application is complete. Proof of ownership or the owner's signed, written permission and ownership proof are included in

	the application, along with the exact physical location of the project within the property description provided.
10 Points	Proof of ownership or the owner's signed, written permission and ownership proof are included in the application. However, the exact physical location of the project within the property description provided is not provided or cannot be determined from the application.
5 Points	Proof of ownership or the owner's signed, written permission and ownership proof are included in the application. This portion of the application is somewhat complete, but additional supporting documentation is needed.
Ineligible	Proof of ownership or the owner's signed, written permission and ownership proof are not included in the application.

3. Project Description.

15 Points	This portion of the application is complete. The proposed project is described adequately to enter into a financial assistance agreement. The application includes the type of material to be used, the dimensions

	and complete description of the area(s) to be surfaced. This portion describes the need for the project, its current status, and the approximate geographic area that will be served by the project.
10 Points	This portion of the application is substantially complete, but a minimal amount of additional information is needed.
5 Points	This portion of the application is somewhat complete, but a significant amount of additional information is needed.
0 Points	This portion of the application is substantially incomplete.

4. Material Summary (the project must use at least 40 percent Missouri generated scrap tires to be eligible. (documented by copies of surface material vendor letters, quotes, contracts, purchase orders, etc.). Bids must specify the minimum percentage of Missouri generated scrap tires utilized in their product(s).

15 Points	Project uses 100 percent scrap tires generated in Missouri (vendor source documentation provided).
5 Points	Project uses more than 40 percent scrap tires generated in Missouri but

	less than 100 percent (vendor source documentation provided).
0 Points	Project uses less than 40 percent scrap tires generated in Missouri or unable to determine or verify percentage of Missouri generated scrap tires used.
Ineligible	Project does not use scrap tires generated in Missouri or vendor does not provide certification and/or documentation of the percentage of Missouri generated scrap tires utilized in their product.

4a. Material Type.

15 Points	Project uses mats/tiles and/or pour-in-place surface material.
10 Points	Project uses a combination of mats/tiles and/or pour-in-place, along with loose surface material.
5 Points	Project uses loose surface material only.
0 Points	There are concerns about the appropriateness of the surface material used or the applicant does not describe the type of surface material to be used.

4b. Material Containment/Support.

15 Points	The described method of containment for the appropriate depth of loose surface material (8") is adequate or project uses mats/tiles or pour-in-place surface material on concrete, asphalt or other suitable support material.
5 Points	There are concerns about the adequacy of the described containment or surfacing.
0 Points	The applicant does not describe any type of containment of the loose surface material or does not describe the support surface on which the mats/tiles or pour-in-place surface material will be placed.

4c. Material Commitment (documented by copies of surface material vendor letters, quotes, contracts, purchase orders, etc.). Bids must specify the minimum percentage of Missouri generated scrap tires utilized in their product(s).

15 Points	Application includes at least 3 quotes from scrap tire material vendors.
10 Points	Application includes 1 or 2 quotes from scrap tire material vendors.

5 Points	Application only lists those scrap tire material vendors that will be targeted for the project, but does not provide any quotes from the scrap tire material vendors for the project.
0 Points	Application contains no information about scrap tire material vendors to be used on the project.

5. Media Exposure.

10 Points	Application includes at least 4 types of media/public exposure events/documents (e.g. email, brochures, newspapers, web site, radio).
5 Points	Application includes 1-3 types media/public exposure events/documents (e.g. email, brochures, newspapers, web site, radio).
0 Points	Application includes no media/public exposure events/documents (e.g. email, brochures, newspapers, web site, radio).

6. Recycling Education.

10 Points	This portion of the application is complete (includes solid waste management education that will be

	incorporated into the school's curriculum or into informational material to be provided to the public by the grant applicant).
0 Points	Significant areas of this portion of the application are incomplete.

7. Cooperative Efforts with Solid Waste Management Region.

15 Points	The Solid Waste Management Region has committed to involvement with the project through presentations/event attendance (region documentation provided).
10 Points	The Solid Waste Management Region endorses the project (region documentation provided).
0 Points	No involvement or endorsement from the Solid Waste Management Region.

8. Scope of Work/8a. Timeline.

15 Points	Project tasks, actions needed to complete the tasks and key personnel responsible for tasks, provided. The scope of work and timeline coincide. The project is likely to be implemented in a timely manner.

5 Points	There are concerns about the project being implemented in a timely manner (portions of scope and timeline coincide).
0 Points	The project is unlikely to be implemented in a timely manner (scope and timeline don't coincide or tasks do not adequately describe completion of the project).

9. Budget/9a. Support Documentation.

15 Points	The budget is complete and supported by 3 or more scrap tire material vendor quotes.
10 Points	This portion of the application is substantially complete, but additional information is needed or less than 3 scrap tire material vendor quotes were provided
0 Points	The budget is not mathematically accurate and/or is missing information.

10. Purchase of additional scrap tire surface material/proof of support. This criteria refers to *ADDITIONAL SCRAP TIRE MATERIAL ONLY.*

15 Points	Applicant will purchase an additional amount of scrap tire

	material that is greater than 50 percent of their requested grant amount is supported by documentation and no other project costs but scrap tire material is included.
10 Points	Applicant will purchase an additional amount of scrap tire material that is greater than 25 percent, but less than 50 percent of their requested grant amount is supported by documentation and no other project costs but scrap tire material is included.
5 Points	Applicant will purchase an additional amount of scrap tire material that is greater than 10 percent, but less than 25 percent of their requested grant amount, is supported by documentation and no other project costs but scrap tire material is included.
0 Points	Applicant will purchase an additional amount of scrap tire material that is less than 10 percent of their requested grant amount, no supporting documentation and other project costs or has included other costs associated with the project.

11a. School District Percentage of Student Population below the Poverty Level (based on DESE data).

30 Points	School district's student population poverty percentage is greater than 75%.
15 Points	School district's student population poverty percentage is greater than 50% and up to 75%.
10 Points	School district's student population poverty percentage is greater than 10% and up to 50%.
5 Points	School district's student population poverty percentage is less than 10%.

OR

11b. Entity's (other than schools) Percentage of Poverty Level (based on Missouri Census Data Center data by county).

30 Points	Zip code's poverty percentage is 40% or higher.
15 Points	Zip code's poverty percentage is 25% up to 40%.
10 Points	Zip code's poverty percentage is 10% up to 25%.
5 Points	Zip code's poverty percentage is 1% up to 10%.

0 Points	Zip code's poverty percentage is less than 1%.

12. Equitable Distribution of Grant Funds Across Missouri.

15 Points	This project assists in providing grant funds equitably to an underserved area of the state.
0 Points	This project serves an area of Missouri where another grant was evaluated at a higher score and is being awarded.

13. Tie Breaker. Once all grant applications are evaluated and scored should multiple applications receive the same score the department shall break such tie by assigning each application a number and selecting numbers in a random draw until grant funds are exhausted.

Nothing in this document may be used to implement any enforcement action or levy any penalty unless promulgated by rule under chapter 536 or authorized by statute.

For more information
Missouri Department of Natural Resources
Solid Waste Protection Program
P.O. Box 176
Jefferson City, MO 65102-0176
800-361-4827 or 573-751-5401
http://dnr.mo.gov/env/swmp

RECORD AND BRIEFS

MAR 28 2016

No. 15-577

In The Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR, MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT

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CONSTITUTIONAL PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

"No state shall . . . deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect, or creed of religion, or any form of religious faith or worship." MO. CONST. art. I, § 7.

STATEMENT OF THE CASE

The Learning Center, a preschool-and-daycare ministry of Trinity Lutheran Church ("Trinity Lutheran"), applied for a competitive grant administered by the Missouri Department of Natural Resources (the "State"). Pet. App. 120a-130a.[1] Trinity Lutheran hoped to obtain public funds to offset the cost of resurfacing its playground with recycled scrap-tire material. *Id.* Though Trinity Lutheran's application scored well in comparison to applicants who were not chosen for funding, the State declined to approve the request, citing Article I, Section 7 of the Missouri Constitution, which reads, in pertinent part: "[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion ...." MO. CONST., art. I, § 7. Pet. App. 152a-153a.

Trinity Lutheran sued, alleging that the State's decision not to fund its playground project violated its First Amendment right to freely exercise its religion and its Fourteenth Amendment right to equal protection of the law. Pet. App. 97a-118a. The district court granted the State's motion to dismiss Trinity Lutheran's claims, and the Court of Appeals for the Eighth Circuit affirmed. Pet. App. 1a-85a.

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[1] Because this case was decided below on a Motion to Dismiss, all facts are assumed to be true as alleged in the Petition.

SUMMARY OF ARGUMENT

The people of Missouri have decided, as a matter of state constitutional policy, that public funds may not be directed to churches. This Court has recognized that state policymakers "retain broad discretion to make 'policy decisions' concerning state spending 'in different ways ... depending on their perceptions of wise state fiscal policy and myriad other circumstances.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006). As part of that discretion, policymakers need not make funds available to satisfy every interest. *See Rust v. Sullivan*, 500 U.S. 173, 193 (1991). "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Id.* While constitutional and statutory limitations may apply in some circumstances, "it is the democratic electoral process that first and foremost provides a check" on the selective advancement of government goals. *Cf. Walker v. Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2245 (2015) (discussing government speech).

Trinity Lutheran argues that the State's policy infringes its First Amendment right to free exercise of religion, but nothing about the policy prohibits the church from fully and freely engaging in religious exercise. Trinity Lutheran remains free, without any public subsidy, to worship, teach, pray, and practice any other aspect of its faith however it wishes. The State merely declines to offer financial

support. This Court has long held that the government does not infringe the exercise of a constitutional right by declining to subsidize it. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546 (1983). The Free Exercise Clause requires that the State not interfere with Trinity Lutheran's religious activities; it does not require the State to provide funding.

The State's policy is also consistent with long-standing principles of equal protection. Forbidding the direct payment of state funds to churches advances legitimate public interests, which include ensuring that no religious denomination receives preferential treatment over another by the State, respecting taxpayers' concerns of conscience, and protecting religious institutions from heightened government control. Trinity Lutheran's contention that this Court demand a more compelling interest—*i.e.*, that the Court apply strict scrutiny, rather than rational basis review—is contrary to settled precedent and would put at risk the many state and federal laws favoring religious groups over their non-religious counterparts. This Court has never applied such a standard in conducting equal protection review of laws differentiating between religious and non-religious groups absent an accompanying First Amendment violation. It should not do so now.

Because the constraints of the First and Fourteenth Amendments do not apply here, this Court should reaffirm the State's ability to follow the mandate of its citizens in setting spending policy consistent with its citizens' own judgment and values.

ARGUMENT

I. The State's decision not to subsidize Trinity Lutheran does not violate the Free Exercise Clause of the First Amendment.

Trinity Lutheran contends that the State has violated the Free Exercise Clause by categorically declaring religious organizations ineligible to compete for a playground-resurfacing subsidy. Pet. Br. at 11-22. But Trinity Lutheran's argument misinterprets the Free Exercise Clause, ignoring its text, history, and this Court's precedent. The Free Exercise Clause, by its plain language, prevents the government from "prohibiting" the free exercise of religion. It does not guarantee churches opportunities for public financing, nor does it require that the government act with strict neutrality toward religious and non-religious interests. The challenged policy places no meaningful restraint on Trinity Lutheran's ability to freely exercise its religion. For that reason, Trinity Lutheran's free exercise claim was properly dismissed.

A. The Free Exercise Clause forbids only government action that "prohibits" the free exercise of religion; it does not require that government subsidize churches.

The Free Exercise Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free*

exercise thereof . . . ." U.S. CONST. amend. I (emphasis added). It has been incorporated into the Fourteenth Amendment and is thus applicable to the states. *E.g. Emp't Div., Dep't. of Human Res. of Or. v. Smith*, 494 U.S. 872, 876-77 (1990) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

1. By its plain terms, the Free Exercise Clause applies only to government action that "prohibits" the free exercise of religion.

The Free Exercise Clause was adopted in reaction to the oppressive practices our Founders recognized in their former sovereign and similar governments throughout history. "A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8 (1947). "In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed." *Id.* at 9. By the time our Constitution was ratified, "there was a widespread awareness among many Americans of the dangers of a union of Church and State." *Engel v. Vitale*, 370 U.S. 421, 429 (1962). To protect against such dangers, the Founders included in the First Amendment the Establishment Clause and the Free Exercise Clause. *See id.* at 429-30. The former clause forbids the enactment of laws "which establish an official religion," whereas the latter "depends on a

showing of governmental compulsion." *See id.* at 430-31.

Trinity Lutheran's contention that the Free Exercise Clause requires the government to provide equal funding opportunities to religious and non-religious groups alike entirely ignores the text of the Clause. In interpreting the scope and application of a constitutional provision, this Court must begin by looking to the plain text of the Constitution itself; if the meaning is clear, it need look no further. *See Reid v. Covert*, 354 U.S. 1, 8 n. 7 (1957) ("This Court has constantly reiterated that the language of the Constitution where clear and unambiguous must be given its plain evident meaning."). With respect to the Free Exercise Clause, "[t]he crucial word in the constitutional text is 'prohibit.'" *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (holding that government project disrupting forest sacred to Native American tribe did not violate tribe's free exercise rights because it did not prohibit the tribe from exercising its religion).

"[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963). It is clear that where the government imposes a criminal penalty on particular religious activity, the affected individual or group may successfully pursue a free exercise claim. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (city ordinances criminalized ritual animal sacrifice, which was a central component of the Santeria religion practiced

by the church that challenged the laws). "[I]ndirect coercion or penalties on the free exercise of religion, not just outright prohibitions," may raise free exercise concerns as well. *Lyng*, 485 U.S. at 450. This Court's precedent, however, "does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs[,]" implicate the Free Exercise Clause. *Id.* at 450-51. This Court has explicitly rejected the proposition that the Free Exercise Clause is violated by any government action that merely "frustrates or inhibits religious practice" because, as the Court has pointed out, "the Constitution ... says no such thing." *Id.* at 456.

2. State policy declining to subsidize churches does not "prohibit" religious exercise.

As the text of the First Amendment shows, the government must ensure that the exercise of religion remains unrestrained, but that does not mean the government must pay the church's bills. "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng*, 485 U.S. at 451 (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963)).

Recently, Justice Thomas observed, "[s]ince well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits." *Obergefell v. Hodges*, 135 S.Ct.

2584, 2631 (2015) (Thomas, J., dissenting). "Religious liberty is about freedom of action . . ., and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice." *Id.* at 2638. "Liberty," however, does not create an entitlement to government benefit—it is a negative right, "and is only the *absence of restraint*." *Id.* at 2635 (emphasis original).

Likewise, James Madison emphatically rejected the proposition that the free exercise of religion depends on government subsidy. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html. As Madison put it, "Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them[] . . . ." *Id.*

This Court has long held that the government has no obligation to fund its citizens' exercise of their constitutional rights. In *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), the Court found no constitutional infirmity in a federal tax policy that withheld tax-exempt status from non-profit organizations that "engage in substantial lobbying." *Id.* at 542-44. The Court noted that by merely refusing to pay for the organization's lobbying activity, the government had "not infringed any First Amendment rights or regulated any First Amendment activity." *Id.* at 546 (citing *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)). The Court "reject[ed] the 'notion that

First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" *Id.*

Similarly, in *Harris v. McRae*, 448 U.S. 297, 316 (1980), this Court held that the government had no obligation to fund medically necessary abortions, despite constitutional protection for abortion rights and federal subsidies for other medically necessary services. *Id.* at 301-06, 316-17. In that case, the challenging party argued that "when an abortion is 'medically necessary to safeguard the pregnant woman's health, . . . the disentitlement to [M]edicaid assistance impinges directly on the woman's right to decide . . . to terminate her pregnancy in order to preserve her health.'" *Id.* at 305-06. For purposes of analysis, the Court assumed that women have a constitutionally-protected right to choose to have an abortion for health-related reasons, but held that, nevertheless, the government had no obligation to provide the resources needed to enable the woman to actually exercise that right. *Id.* at 316-17. As the Court pointed out, the government's decision not to fund medically necessary abortions left indigent women with "at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if [government] had chosen to subsidize no health care costs at all." *Id.* In other words, the government's refusal to provide funding for abortion services was not coercive in any constitutionally significant way.

The Court's reasoning in these cases echoes the principle expressed in *Lyng* and noted above—the First Amendment protects individuals from government interference, but it does not entitle

individuals to government subsidy. *See Lyng*, 485 U.S. at 451. "[A]lthough government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation." *Regan*, 461 U.S. at 549-50 (quoting *Harris*, 448 U.S. at 316) (bracketed language original). Although the organization seeking the subsidy in *Regan* "does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like," the Court reasoned, "the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.'" *Regan*, 461 U.S. at 550 (quoting *Harris*, 448 U.S. at 318).

Like the complaining parties in *Regan* and *Harris*, Trinity Lutheran argues that its ability to fully realize a constitutional right has been frustrated by the government's decision to withhold public funding. But, as *Regan* and *Harris* teach, the Constitution does not create an entitlement to government funding simply by recognizing a right as fundamental or protected. *See Regan*, 461 U.S. at 550. And Trinity Lutheran's free exercise claim is much weaker than the constitutional claims asserted in *Regan* and *Harris* because Trinity Lutheran cannot even argue that its ability to exercise its constitutional right depends on government support. Trinity Lutheran concedes that its request for playground-resurfacing funding is "wholly secular." Pet. Br. at 39. If the government's refusal to provide indigent women with financial support for medically necessary abortions does not unconstitutionally burden affected women's abortion rights, the

government's refusal to subsidize a church's "wholly secular" playground-resurfacing project likewise does not create an unconstitutional burden on the church's right to freely exercise religion.

3. Like the program upheld by this Court in *Locke v. Davey*, the State's policy in this case does not prohibit the free exercise of religion.

In its focus not on any government prohibition, but rather on a government subsidy it believes it is entitled to receive, Trinity Lutheran's free exercise claim is most closely analogous to the claim rejected by this Court in *Locke v. Davey*, 540 U.S. 712 (2004). *Locke* involved a scholarship program administered by the State of Washington that provided financial aid to qualified students to use for postsecondary education expenses. 540 U.S. at 715-16. All students who met the program's qualifying criteria would receive funding, but students were ineligible for the scholarships if they chose to pursue a degree in theology. *Id.* That limitation was a consequence of a provision in the Washington Constitution that states, in pertinent part: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment." *Id.* at 716, 719, n.2 (quoting WASH. CONST. art. I, § 11).

The petitioner, Davey, qualified for the scholarship in all respects except that he wished to pursue a devotional theology degree, consistent with his interest in training for "a lifetime of

ministry, specifically as a church pastor." *Locke*, 540 U.S. at 717. Because his intended course of study was theological, Davey was denied scholarship funding. *Id.* Davey sued, alleging that Washington's refusal to award him scholarship funds solely because he wished to pursue a theological degree violated, among other constitutional provisions, the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 718.

This Court found no constitutional violation in Washington's decision to make students who pursued theological degrees ineligible for scholarship funding. *Id.* at 718-25. Importantly, the Court did not hold that Washington was required by the Establishment Clause to withhold the funds from Davey and other devotional students. *Id.* at 719. Instead, the Court reasoned, this situation fell within the "play in the joints" between the Establishment and Free Exercise Clauses of the First Amendment, where certain state actions may be "permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.*

In finding that Washington's funding restriction did not violate the Free Exercise Clause, the Court focused especially on the minimal burden the policy placed on Davey's right to freely exercise his religion. *Id.* at 720-21. The Court contrasted Washington's scholarship policy with the city ordinances invalidated in *Lukumi*, noting that the ordinances at issue in that case "sought to suppress ritualistic animal sacrifices of the Santeria religion," going so far as to actually criminalize that particular religious

rite, whereas "[i]n the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind." *Id.* at 720. Washington's scholarship program, the Court pointed out, "does not deny to ministers the right to participate in the political affairs of the community" (contrasting *McDaniel v. Paty*, 435 U.S. 618 (1978)), nor does it "require students to choose between their religious beliefs and receiving a government benefit." *Id.* at 720-21 (contrasting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981); and *Sherbert v. Verner*, 374 U.S. 398 (1963)). The Court concluded, "[t]he State has merely chosen not to fund a distinct category of instruction." *Id.* at 721.

This Court's holding and analysis in *Locke* applies squarely to the present case. Trinity Lutheran, like Davey, applied for government funds but was denied funding because of its particular religious status (Pet. App. at 129a-130a, 152a); *Locke*, 540 U.S. at 717. The State's funding policy here places no meaningful burden on Trinity Lutheran's religious practice—certainly not such a burden that it could reasonably be called a "prohibition" on the free exercise of religion. Despite its ineligibility for the playground-resurfacing grant, there is not a single thing that Trinity Lutheran is prohibited from or penalized for doing as a consequence of state action. It can still worship as it sees fit. It can teach as it sees fit. It can even resurface its playground as it sees fit. The State has merely chosen not to subsidize Trinity Lutheran's activities.

Trinity Lutheran argues that the categorical exclusion of religion from the playground-resurfacing program makes the differential treatment here more egregious than that of the Washington program in *Locke*. Pet. Br. at 44. But, in fact, the two government policies are alike in their exclusivity. By the terms of the playground-resurfacing grant, any entity "owned or controlled by a church, sect, or denomination of religion" is ineligible for funding. Pet. App. at 128a. In *Locke*, any student who was "pursuing a degree in theology" was ineligible for scholarship aid. 540 U.S. at 716. Trinity Lutheran argues that the State's policy here focuses on who receives funding, whereas the Court's concern in *Locke* focused only on how the funds would be used. Pet. Br. at 40. But this is a difference in phrasing, not fact. In both cases, a definable class of funding applicants was deemed ineligible—here, applicants who choose to operate as part of a church; in *Locke*, students who choose to pursue theology degrees. If the government can refuse a subsidy to the latter group without thereby prohibiting its members from freely exercising their religion, the same can be said of the State's policy toward the former.

The State's refusal to make direct payments to churches, like the scholarship policy upheld in *Locke*, has strong historical roots. The Court in *Locke* emphasized that a state's traditional anti-establishment interest plainly includes a prohibition on funding religious training, and that Washington's policy to that effect "is scarcely novel." *Locke*, 540 U.S. at 722. The same can be said of the State's prohibition against making a direct money payment

to a church. This Court has recognized, even in upholding public programs that support religious institutions in other ways, that "special Establishment Clause dangers" exist "where the government makes direct money payments to sectarian institutions." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 842 (1995) (citations omitted). Trinity Lutheran's insistence that its playground-resurfacing project is secular does not solve the problem—money is fungible, and a dollar saved on capital improvements is an extra dollar that can be spent for religious teaching, salaries for church staff, or other religious purposes. It does not necessarily follow, of course, that the State would violate the Establishment Clause if it broadened funding availability to include churches. It simply means that the First Amendment leaves the State room to make a policy choice—this is, as the Court put it, the "play in the joints."

Trinity Lutheran mistakes the State's adherence to traditional anti-establishment values for hostility to religion. Pet. Br. at 41-42. In so arguing, the church claims that Article I, Section 7 of the Missouri Constitution has a "credible connection to the religious bigotry exhibited by the Blaine Amendment" (Pet. Br. at 42-43). Yet Trinity Lutheran offers nothing to support this allegation, and the facts suggest otherwise. The text of Missouri's Article I, Section 7 shares little in common with the text of the Blaine Amendment. The Blaine Amendment, originally proposed in 1875, focused specifically on withholding state aid from funds devoted to public schools. *See, e.g.*, Mark

Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 556-57 (2003). Article I, Section 7 of the Missouri Constitution, in contrast, effected a broader "no-aid" provision much more like the State of Washington's, with which this Court found no fault in *Locke*. 540 U.S. at 719 n.2, 723-24. And despite Trinity Lutheran's contention that the State was motivated by bias against Catholics, the text of Article I, Section 7 is both even-handed ("no money shall ever be taken from the public treasury ... in aid of *any* church, sect, or denomination of religion . . .") and protective of religious freedom ("no preference shall be given to nor any discrimination made against any church, sect, or creed of religion, or any form of religious faith or worship."). MO. CONST. art. I, § 7.

In addition, the debates surrounding the adoption (and subsequent readoption) of Article I, Section 7 reveal no anti-Catholic or anti-religious bias at all. To the contrary, the primary concern expressed at the 1875 debate seemed to be whether the legislature would be permitted to pay a chaplain if the provision was adopted. *See* DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, Vol. IV, at 55-63 (Isidor Loeb & Floyd C. Shoemaker, eds., 1938). A better explanation of the Section's purpose can be found in the debates during the 1943-1944 constitutional convention, during which the Section was readopted. There, Delegate Phillips of St. Louis explained, without objection, that the purpose of

Section 7 was to prevent religious establishment by states as seen in the founding era:

> In a great many of our communities when they came over here from England they were granted charters and under those charters the right was given to certain church institutions to levy taxes against the members of the congregation and I think in some of the New England towns, the town council levied taxes against the members of the congregation for support of the church. And one of the fundamental, one of the things that is involved in this language was to stop that sort of thing.

DEBATES OF THE 1943-1944 CONSTITUTIONAL CONVENTION OF MISSOURI. Vol. 6, at 1504 (2008) (available at: http://digital.library.umsystem.edu/cgi/t/text/pageviewer-idx?c=mcd;cc=mcd;sid=3b57654fea64cd8c6e2b07d1f4ff6d51;rgn=full%20text;idno=mcd194506;view=image;seq=14).

Delegate Phillips's observation echoed the analysis of the Missouri Supreme Court, which had recently held that Article I, Section 7 forbade the State from directly funding a parochial school. *Harfst v. Hoegen*, 163 S.W.2d 609 (Mo. banc 1942). In so holding, the Court extolled the virtues of parochial education, characterizing it as "an embodiment of one of the highest ideals that man may enjoy." *Id.* at 614. Even so, the Court recognized the paramount principle of "religious freedom and religious equality," describing it as a "guiding star in the

growth and development of our form of government." *Id.* at 611. The Court determined that the absolute separation of church and state as expressed in the Missouri Constitution preserved religious liberty for Missouri's citizens and peace in the state:

> If the [public] management of this [parochial] school were approved, we might next have some other church gaining control of a school board and have its pastor and teachers introduced to teach its sectarian religion. Our schools would soon become the centers of local political battles which would be dangerous to the peace of society where there must be equal religious rights to all and special religious privileges to none. The faithful observance of our constitutional provisions happily makes such a condition impossible.

Id. at 614.

The only connection suggested by Trinity Lutheran between Article I, Section 7 of the Missouri Constitution and the national Blaine Amendment is temporal coincidence. Pet. Br. 43. But history shows that Missouri's interest in maintaining a strict separation of church and state predated the Blaine Amendment's national emergence by half a century. Missouri's original Constitution, adopted in 1820 as part of Missouri's statehood, included language stating that "no man can be compelled to erect, support, or attend any place of worship, or to maintain any minister of the gospel, or teacher of

religion . . ." MO. CONST. art. XIII, § 4 (1820).[2] The Constitution adopted in 1875 expanded upon this concept, to be sure, but it would be factually inaccurate to suggest that Missouri's prohibition against collecting taxes or fees for religious purposes began with Blaine. Article I, Section 7's connection to the national Blaine Amendment is no more credible here than was the connection of Washington's no-aid provision to the Blaine Amendment as discussed in *Locke*, and the argument should be afforded no more weight.

Without its "Blaine Amendment" argument, Trinity Lutheran's contention that the State has exhibited hostility to religion is reduced to a tautology: the State's unlawful, differential treatment of church-owned daycares exhibits hostility to religion, Trinity Lutheran argues, and the State's hostility to religion makes its differential treatment of church-owned daycares unlawful. Pet. Br. at 41-42. But as will be discussed in greater detail in Part II, *infra*, the State of Missouri repeatedly and consistently enacts policies, including Article I, Section 7 of its Constitution, that are protective of religious freedom and aim to support religious objectives. Its decision not to use state funds to support religious organizations is rational, and there is nothing to suggest that it is the product of religious animus.

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[2] Portions of this section were readopted in what would become Article I, Sections 5 and 6 of the Missouri Constitution of 1875.

Trinity Lutheran also points out that, in *Locke*, Davey requested state funds for an inherently religious purpose—theological education—whereas Trinity Lutheran's intent to resurface its playground is entirely secular. Pet. App. at 36-41. But this distinction does not work in Trinity Lutheran's favor. A state's refusal to support an aspiring pastor's religious education surely exerts a greater pressure on free religious exercise than does a state's refusal to subsidize a church daycare's secular capital improvement project.

In highlighting the secular nature of its renovation project, Trinity Lutheran confuses potential Establishment Clause issues with the free exercise question presented. Trinity Lutheran cites a series of cases in which this Court held that government grants to religious institutions for secular purposes did not violate the Establishment Clause. Pet. Br. at 38-39 (citing *Comm. for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980) (state funds could be used to reimburse religiously affiliated schools for conducting state-required tests); *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736 (1976) (grants may be provided for secular purposes to colleges and universities, including religiously affiliated institutions); *Hunt v. McNair*, 413 U.S. 734 (1973) (state could issue bonds in support of religiously affiliated college where funding had secular purpose)). But this argument misses the point. The State does not argue that giving Trinity Lutheran funds for playground resurfacing would violate the Establishment Clause. Instead, the State merely contends that its decision

not to subsidize playground improvements does not "prohibit" Trinity Lutheran from freely exercising its religion. It is difficult to conceive of a less oppressive burden on the exercise of religion than the State's decision not to pay for an elective upgrade to a church's physical property that the church insists is "not remotely religious" (Pet. Br. at 37).

Finally, Trinity Lutheran attempts to distinguish *Locke* by referring to the State's playground-resurfacing grant program as a "generally available public benefit" that, Trinity Lutheran claims, the State cannot withhold from religious groups. Pet. Br. at 11, 17, 29-31, 34, 37, 39, 44. But, in fact, the grant program is one of *limited* availability. The program is funded by a fee assessed on the retail sale of new tires, and only five percent of that fund, at most, may be spent on the scrap-tire grants. Mo. Rev. Stat. § 260.273 (2014 Supp.)[3]; 10 CSR 80-9.030(2) (May 31, 2016); Pet. App. at 89a. Because resources are limited, the State developed a process by which interested applicants compete for funding. 10 CSR 80-9.030(5). As Trinity Lutheran acknowledges, only fourteen of the forty-four applicants in 2012 received funding. Pet. Br. at 6; Pet. App. at 154a. In other words, more than two-thirds of the applicants, each of whom may well have met the minimum qualifications to receive money under the grant program, nevertheless were rejected. While the State applies a point-based scoring system to provide some structure and consistency to its decision-making, ultimately the program administrators must make

[3] All references to Mo. Rev. Stat. are included in the 2012 Cumulative Supplement unless noted otherwise.

subjective, discretionary decisions regarding who will receive funds and who will not. *See* Pet. App. at 120a-154a.

Trinity Lutheran's misapprehension of the playground-resurfacing grant program as a "generally available public benefit" is essential to its constitutional argument; when that mistaken premise is rejected, the rest of the argument collapses. Trinity Lutheran's position appears to be that because non-religious daycares may all receive playground-resurfacing grants, the refusal to provide religious daycares with similar funding "violates the Free Exercise clause no less than if [the State] had imposed a special tax." *See Locke*, 540 U.S. at 726 (Scalia, J., dissenting). But not all non-religious daycares receive the funding—as noted above, just over thirty percent of those that applied for funding in 2012 received it. Pet. App. at 154a. Trinity Lutheran does not attempt to argue that its right to freely exercise its religion would have been violated had it been denied funding simply because its application failed to achieve a sufficiently high score to prevail over other more competitive applicants. Nor does it argue that its ability to freely exercise its religion was impaired prior to its application for funding, when its playground was surfaced with pea gravel. But if Trinity Lutheran's freedom to exercise religion is unaffected by whether it actually receives any money or actually resurfaces its playground, the State's refusal to provide funding here cannot possibly have burdened the church's religious practice. Trinity Lutheran's ability to freely practice its religion, having been deemed ineligible for grant

funding here, is no different than had it been denied funding simply because its application was uncompetitive, or had the grant program never been created at all.

This distinction differentiates the present case from every case cited by Trinity Lutheran in which a free exercise violation has been found. In each case in which a government benefit was withheld due to someone's religious exercise, the benefit was one that all similarly-situated, qualified individuals were entitled to receive, without a discretionary decision to be made by government administrators. *Contrast, e.g.*, *Sherbert*, 374 U.S. 398 (government withheld unemployment benefits from employee whose religious beliefs forbade her from working on the Sabbath); *Hobbie*, 480 U.S. 136 (same); *Thomas*, 450 U.S. 707 (government refused to pay unemployment benefits for worker whose religious beliefs prevented him from making weapons); *McDaniel v. Paty*, 435 U.S. 618 (1978) (state law excluded ministers from political participation by disqualifying them from holding public office); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (state constitution disqualified anyone who would not declare a belief in God from seeking state office). By punishing religious adherence with the deprivation of a vested right, the burden placed on religious practice in these cases went beyond mere "frustration" or "inhibition" and crossed the line into "prohibition." Trinity Lutheran tries to characterize the playground-resurfacing grant program as an entitlement akin to these other benefits, but it is not.

Because Trinity Lutheran cannot demonstrate that its free religious exercise was impacted at all—

let alone "prohibited"—by the State's discretionary decision not to fund its secular playground-improvement project, Trinity Lutheran's free exercise claim must fail.

B. The Free Exercise Clause permits the State to address religious and non-religious interests in a non-neutral manner.

Unable to show that any aspect of its religious practice was "prohibited" by the State's policy, Trinity Lutheran relies on dicta appearing in some of this Court's cases to argue that the Free Exercise Clause requires the State to maintain strict neutrality between religious and non-religious persons and groups. Pet. Br. at 11-22 (citing *Lukumi*, 508 U.S. at 542; *Hobbie*, 480 U.S. at 148; *Sherbert*, 374 U.S. at 409). But Trinity Lutheran conflates this Court's free exercise jurisprudence with precedent analyzing the Establishment Clause and Equal Protection Clause, and thus mistakenly asserts that the Free Exercise Clause requires neutrality when, in fact, the Constitution "says no such thing." *Cf. Lyng*, 485 U.S. at 450.

In fact, this Court has repeatedly upheld, and has even required, government conduct that is decidedly non-neutral. Much of this Court's precedent applying the Free Exercise Clause involves government failure to accommodate demands for religious exemptions from otherwise neutral policies. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, for example, this Court held that the First Amendment exempts churches from generally-

applicable employment discrimination laws with respect to the church's employment of clergy. 132 S.Ct. 694, 702-03, 706 (2012). The Court noted that the Free Exercise Clause prevents the government "from interfering with the freedom of religious groups to select their own [ministers]," and that to hold otherwise would interfere with "the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id.* at 703, 706. Notably, the Court found unsatisfactory the suggestion that the right to free association, which would apply neutrally to religious and secular groups, adequately protects the church from government interference, observing that the First Amendment "gives special solicitude to the rights of religious organizations." *Id.* at 706.

Similarly, in *Sherbert*, *Hobbie*, and *Thomas*, three cases cited by Trinity Lutheran, government employees claimed that facially neutral government policies limiting the availability of unemployment benefits violated their rights to freely practice their religion. *See Sherbert*, 374 U.S. at 402; *Hobbie*, 480 U.S. at 139-40; *Thomas*, 450 U.S. at 709-11. In essence, this Court found the government's failure to accommodate the individuals' religious beliefs violated the Free Exercise Clause not because the government failed to treat religious individuals the same as everyone else, but because it failed to treat them differently. Without granting a religious exemption, the Court held, a neutral government policy had imposed such a significant consequence on the affected individuals' religious exercise that it qualified as a "prohibition." *See Sherbert*, 374 U.S. at

404 (government pressure on complainant to "forego that [religious] practice is unmistakable"); *Hobbie*, 480 U.S. at 141 (noting that "important" benefit was conditioned on conduct proscribed by individual's religion, thereby putting "substantial pressure" on religious adherent to violate his beliefs) (quoting *Thomas*, 450 U.S. at 717-18).

Trinity Lutheran cites a number of cases in which this Court has discussed the importance of "neutrality," but none of those cases turn on the application of the Free Exercise Clause. Several involved government efforts to suppress religious speech or limit a church's access to a public forum. *See Rosenberger*, 515 U.S. 819 (University's refusal to provide equal funding to Christian-oriented student newspaper unlawfully regulated speech based on viewpoint); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (exclusion of Christian club from school-created public forum was unconstitutional viewpoint discrimination); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (school could not limit religious group's use of limited public forum on school property on basis of group's religious viewpoint); *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015) (municipal code imposing stricter limits on signs posted by non-profits than on those posted by others was content-based restriction in violation of First Amendment right to free speech).

Other cases involved policies favoring religious organizations or objectives that this Court held violated (or did not violate) the Establishment Clause. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (law requiring school day to

begin with Bible reading violated the Establishment Clause); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (state violated Establishment Clause when redrawing school district boundary lines with purpose of including only property owned by particular Jewish sect); *Marsh v. Chambers*, 463 U.S. 783 (1983) (state legislature's practice of beginning each day with a state-paid chaplain's prayer does not violate Establishment Clause); *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014) (town's practice of opening town board meetings with prayer does not violate Establishment Clause); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990) (Equal Access Act, requiring schools to provide same school-property access to religious as to non-religious clubs, does not violate Establishment Clause); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (state-sponsored program allowing parents to use vouchers to help pay for their children's religious education did not violate Establishment Clause).

And still others discuss the application of the Equal Protection Clause in circumstances having nothing to do with religion. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (applying the Equal Protection Clause to law involving mental-disability classification); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (reliance on race-based classification in child-custody dispute failed to satisfy strict scrutiny under Equal Protection Clause). Trinity Lutheran has cited these cases to support its argument that the Constitution, in many contexts, prohibits status-based discrimination. Pet. Br. at 15-18. But this is an

equal protection argument masquerading as a free exercise claim.[4] These cases shed little light on the First Amendment question—whether differential treatment of religious and non-religious groups "prohibits" the free exercise of religion.

It is undisputed that the policy at issue in this case is not facially neutral—churches are, by virtue of their religious character, ineligible for playground-resurfacing grant funding. But this Court examined a similarly non-neutral policy in *Locke* and found it constitutionally sound, emphasizing the lack of coercive effect on the disadvantaged students' religious practice. *See Locke*, 540 U.S. at 720-21. While neutrality toward religion may be, in many instances, powerful evidence that a state policy is compliant with the Free Exercise Clause, it is neither a necessary nor a sufficient factor. The Free Exercise Clause protects religious liberty by demanding government non-interference, not neutrality.

Because the State's refusal to provide funding for a "wholly secular" playground-resurfacing project in no way prohibits Trinity Lutheran from fully and freely exercising its religion, the church's Free Exercise Clause claim fails.

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[4] Trinity Lutheran's Equal Protection Clause claim is addressed in Part II, *infra*.

II. The State's decision not to subsidize Trinity Lutheran's playground-resurfacing project does not violate the Equal Protection Clause of the Fourteenth Amendment.

Trinity Lutheran next argues that the State's unequal treatment of religious groups in determining eligibility for the playground-resurfacing subsidy program violates the Equal Protection Clause of the Fourteenth Amendment. Pet. Br. at 22-44. But Trinity Lutheran's argument applies the wrong standard of review and overlooks the legitimate, rational bases underlying the State's policy choice.

The Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. Generally, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 440. "When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude,[] and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.* (citations omitted).

A. Government policies that treat the class of "all religious groups" differently from similarly situated non-religious groups survive equal protection review if supported by a rational basis.

When evaluating the constitutionality of a government policy that treats similarly situated groups differently, this Court applies the highest level of scrutiny only if the distinction interferes with the exercise of a fundamental right or if it differentiates based on a suspect classification. *E.g. Vacco v. Quill*, 521 U.S. 793, 799 (1997). Absent such circumstances, the Court will uphold the policy "so long as it bears a rational relation to some legitimate end." *Id.*

Trinity Lutheran contends that the Court should apply strict scrutiny to the State's exclusion of religious organizations from the playground-resurfacing grant program because the State's policy "employs a suspect classification." Pet. Br. at 22-27. But Trinity Lutheran's argument finds no support in the cases it cites or elsewhere in this Court's precedent for the proposition that the class of "all religious groups," as opposed to "all non-religious groups," constitutes a suspect classification.

1. This Court applies rational-basis review to policies that treat "all religious groups" differently from similarly situated non-religious groups.

Nothing in this Court's precedent suggests that a policy differentiating "all religious groups" from "non-religious groups" requires anything but rational basis review in the absence of an accompanying violation of the Free Exercise or Establishment Clause. To the contrary, in *Locke* this Court applied rational basis review in summarily upholding Washington's policy withholding scholarship funds from theology students. 540 U.S. at 720 n.3. The Court explained that because it found no violation of the Free Exercise Clause in the state's program, equal protection analysis required only the rational basis test, which the program passed. *Id.*

Likewise, in *Johnson v. Robison*, 415 U.S. 361 (1974), the Court declined to apply any form of heightened scrutiny to a law purportedly burdening religious individuals who declined military service as conscientious objectors. *Id.* at 375 n. 14. The Court held that denial of certain veteran's educational benefits to these individuals did not violate their fundamental right to free exercise of religion, and then addressed their Equal Protection claim, stating, "since we hold . . . that the [challenged] Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational basis test." *Id.*

Trinity Lutheran appears to concede that, in the absence of a First Amendment violation, a policy differentiating on the basis of religion does not call for strict scrutiny on the theory that the free exercise of religion is a fundamental right. Pet. Br. at 24-25 ("[I]t is completely unsurprising that the *Locke* court would judge a fundamental-right claim under rational basis scrutiny after concluding the law did not violate the fundamental right in question.").

Trinity Lutheran argues instead that strict scrutiny is required because "religion" creates "an inherently suspect classification." Pet. Br. at 22-27. To support this argument, Trinity Lutheran cites a handful of cases in which this Court has listed "religion" among those distinctions deemed "inherently suspect." Pet. Br. at 22-23. But none of the cited cases actually apply strict scrutiny to a law differentiating between "all religious groups" and "non-religious groups." In fact, none involve religious classifications at all. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (evaluating city's economic regulation exempting long-established vendors, but not newly established vendors, from certain requirements); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 649-51 (1992) (reviewing state law establishing venue differently depending on whether a corporate defendant was based in-state or out-of-state); *Plyler v. Doe*, 457 U.S. 202, 205, 223-30 (1982) (analyzing state law denying undocumented schoolchildren a free public education); *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (considering federal program advantaging minority applicants for new broadcast licenses)

(overruled by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)). Trinity Lutheran has failed to cite a single case in which this Court has applied strict scrutiny to a law treating religious groups differently from non-religious groups or in which this Court characterized "all religious groups" as a suspect classification.

When this Court has described "religion" as an inherently suspect classification, it has done so in reference to laws drawing distinctions among religious denominations, advantaging one over another. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338-39 (1987) (noting that "laws discriminating *among* religions are subject to strict scrutiny . . . .) (emphasis original) (citing *Larson v. Valente*, 456 U.S. 228, 246 (1982)). The Missouri Constitution does not discriminate among religious sects or denominations—indeed, it expressly forbids such discrimination. *See* MO. CONST. art. I, § 7 ("... no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."). Thus, the language Trinity Lutheran relies on to support its standard-of-review argument has no application here.

In fact, when analyzing laws differentiating between "all religious groups" and non-religious groups, this Court has applied rational basis review. In *Amos*, a former employee of a secular, non-profit facility owned and operated by the Church of Jesus Christ of Latter-Day Saints sued for wrongful termination. 483 U.S. at 329-34. He alleged that the

provision of Title VII of the Civil Rights Act of 1964 that permits religious employers to discriminate on the basis of religion against employees who have non-religious jobs violated the Establishment Clause and the Equal Protection Clause. *Id.* The Court first found no Establishment Clause violation in Title VII, and then turned to Equal Protection. *Id.* at 334-39. The employee argued that the law "offend[ed] equal protection principles by giving less protection to the employees of religious employers than to the employees of secular employers." *Id.* at 338. The Court agreed that Title VII treated religious and non-religious employers differently, but required only a rational basis for the policy, noting that where a law treats all religious denominations equally, there is no justification for applying strict scrutiny if the law does not violate the Establishment Clause. *Id.*

2. The class of "all religious groups," as opposed to individual religious sects, does not meet the traditional criteria considered in identifying suspect classes.

Further weighing against Trinity Lutheran's request that this Court characterize "all religious groups" as a singular, suspect class is that the indicia typically considered by this Court in identifying suspect classes are absent. When determining whether a classification qualifies as "suspect," this Court historically has declined to designate it as such if "the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command

extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (declining to characterize as suspect a classification based on relative poverty). Individual religious denominations may certainly qualify as suspect classes under this definition. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938) (suggesting that a "more searching judicial inquiry" would be required for statutes directed at "particular religious . . . minorities."). A class comprising "all religious groups," however, does not.

Any suggestion that "religion," generally speaking, confers upon a person or group "political powerlessness" in the United States ignores the extent to which religion is deeply intertwined with our political and cultural history. As this Court has observed,

> [R]eligion has been closely identified with our history and government . . . . The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself . . . . It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are "earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . .

> guide them into every measure which may be worthy of his [blessing . . . .]"

Van Orden v. Perry, 545 U.S. 677, 683 (2005) (quoting *Schempp*, 374 U.S. at 212-13). If "all religious groups" can even be characterized as a discrete and insular class, that class has two unique and powerful protections against governmental meddling—the Establishment and Free Exercise Clauses of the First Amendment. *See e.g. Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970) (the Court, applying the First Amendment, "will not tolerate either governmentally established religion or governmental interference with religion."); U.S. CONST. amend. I. Armed with the First Amendment, the class of "all religious groups" enjoys greater freedom from the burden of government than does virtually any other class in the nation.

And history shows that when the class of "all religious groups" has been unable to achieve its desired results by relying on the First Amendment, it is able to drive policy through the political process. For example, the enactment of the Religious Freedom Restoration Act ("RFRA") and subsequent enactment of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") demonstrate the political power of religious interests. In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877-79 (1990), this Court held that "an individual's religious beliefs" do not "excuse him from compliance" with generally applicable, otherwise valid state laws. In so holding, the Court acknowledged that the Free Exercise Clause confers broad protections upon

religious practice, but reasoned that to permit an individual to excuse himself from compliance with the law based solely on his religious beliefs "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 877, 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878)). In concluding its opinion, however, the Court gave advocates for broad religious power reason to hope, noting that a society so committed to religious freedom that it would enshrine the Free Exercise Clause into its Constitution "can be expected to be solicitous of that value in its legislation as well." *Smith*, 494 U.S. at 890.

Just three years later, Congress displayed the extent of its solicitousness by enacting RFRA, which, by its express terms, sought to abrogate the Court's ruling in *Smith*. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2761 (2014); 42 U.S.C. § 2000bb(a)(4) (1993). Under RFRA, the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." *See* 42 U.S.C. § 2000bb-1(a) (1993). The government could persist in its regulation only if it could demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. 42 U.S.C. § 2000bb (1993). This legislation did not just codify free exercise jurisprudence that pre-existed *Smith*, it imposed a new, more demanding standard such that "[l]aws valid under *Smith* would fall under RFRA without regard to whether they had the object

of stifling or punishing free exercise." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). This Court held in *City of Boerne* that in enacting RFRA, Congress had overstepped its authority under Section 5 of the Fourteenth Amendment to regulate the states. *Id.* at 534-36. As a result, RFRA could apply only to action by the federal government. *See Hobby Lobby*, 134 S.Ct. at 2761.

Again, Congress responded. *Id.* Three years later, it enacted RLUIPA, which "imposes the same general test as RFRA but on a more limited category of government actions." *Id.* (citing *Cutter v. Wilkinson*, 544 U.S. 709, 715-16 (2005)). Congress applied RLUIPA to programs or activities that receive federal financial assistance, thereby extending its reach to the states. *See* 42 U.S.C. § 2000cc(a)-2000cc-1 (2000). RLUIPA also omitted any reference to the First Amendment, defining the "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," and mandated that the law be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." *See Hobby Lobby*, 134 S.Ct. at 2762 (citing 42 U.S.C. § 2000cc-5(7)(A) (2000), § 2000cc-3(g) (2000)).

The class of "all religious groups" has proven effective not just in moving federal policy, but also in achieving favorable results in Missouri. Numerous provisions of Missouri law, both in statute and in the Missouri Constitution itself, confer benefits upon "religion" and religious individuals and groups based solely on their religious identity. For example,

the Missouri Human Rights Act, which, among other things, forbids employers in the state from discriminating against employees on the basis of race, color, religion, national origin, sex, ancestry, age, or disability, exempts "corporations and associations owned and operated by religious or sectarian groups" from its definition of "employer." Mo. Rev. Stat. §§ 213.010(7) (2000), 213.055 .1(1) (2000). Likewise, Missouri law exempts child-care facilities and foster homes operated by religious organizations from the requirement that those facilities be licensed by the State. Mo. Rev. Stat. §§ 210.211.1(5) (Supp. 2014), 210.516.1(5) (Supp. 2014). Missouri law also exempts individuals who assert a religious objection from the requirement that their children receive immunizations before attending school. Mo. Rev. Stat. § 167.181.3 (2012 Cum. Supp.). And in 2012, the citizens of Missouri amended the State Constitution to add an additional layer of protection to religious freedom in the state, including express protections for the right to pray, the right of the Missouri General Assembly to invite clergy to pray at public meetings, and the right of Missouri students to express their religious beliefs in their school assignments and refuse assignments that violate their beliefs. MO. CONST. art. I, § 5. Trinity Lutheran's suggestion that the State of Missouri is hostile to religion or seeks to deny religious organizations "the right to establish their religious self-definition in the political, civic, and economic life of [the] larger community" (Pet. Br. at 42) (internal marks and citations omitted) has no basis in fact.

While individual religious denominations may enjoy greater or lesser political influence at any particular time, the single class of "religious groups" has a history not of political powerlessness, but of almost singular political potency. By any traditional measure, the class of "all religious groups" cannot be characterized as suspect.

3. Applying strict scrutiny to government policies that treat the class of "all religious groups" differently from similarly situated non-religious groups would jeopardize the many state and federal policies that provide special advantages to religious groups.

Trinity Lutheran argues throughout its brief that it wants to be "treated on equal terms" with other, similarly situated groups. *See* Pet. Br. at 21-22, 34, 42. But, of course, Trinity Lutheran, like all religious organizations, is *not* treated on equal terms with similarly situated, non-religious entities. Instead, Trinity Lutheran enjoys a host of legal benefits afforded it solely because it is a religious organization. *See* Part II.A.2, *supra*. Trinity Lutheran asks this Court to hold that government policies that treat religious organizations differently than non-religious organizations must be subjected to strict scrutiny under the Equal Protection Clause, a standard that permits classifications only if they "are narrowly tailored to further compelling governmental interests." *E.g. Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). But the application of such a standard would imperil not only the policy Trinity

Lutheran challenges here, but also the many benefits that state and federal governments afford religious groups by virtue of the groups' religious identity.

If this Court were to adopt Trinity Lutheran's proposal, characterizing "all religious groups" as a suspect class and thereby requiring strict scrutiny for any policy disadvantaging "all religious groups" relative to non-religious groups, then the Court must also apply strict scrutiny in the inverse situation, where policy advantages "all religious groups" relative to non-religious groups. This Court has held that equal protection of the law is reciprocal—the "principle of equal protection" does not permit "the recognition of special wards entitled to a degree of protection greater than that accorded others." *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411, 2417 (2013) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 (1978)).

Again, *Amos* is instructive. In *Amos*, the law (Section 702 of Title VII) provided to religious organizations a benefit unavailable to any similarly situated non-religious employer—the right to discriminate against employees, even those whose jobs involved no religious function, on the basis of the employee's religious preference. 483 U.S. at 329-33. This Court had no trouble articulating a rational basis to support the law. *Id.* at 339. But it is not so clear that the religious-organization exemption would survive strict scrutiny. Does the government have a compelling interest in permitting religious organizations to discriminate against employees with secular jobs on the basis of that employee's religion, especially when, as Justice Brennan pointed out in

concurrence, such an exemption tends to burden the employees' own religious liberty? *See* 483 U.S. at 340-41 (Brennan, J., concurring). And is the exemption narrowly tailored to achieve that interest, even though it permits the religious employer to discriminate against an employee whose work has no discernable religious function? *See id.* at 342-43. Perhaps so, but such a conclusion would require a more searching equal protection analysis than the summary discussion in *Amos* provides.

Likewise, any case in which RFRA or RLUIPA has been applied to grant a special religious exemption to an otherwise generally applicable law may be vulnerable to reconsideration. As discussed above, RFRA and RLUIPA were enacted to provide greater protection to religious organizations than is required by the First Amendment. *See Hobby Lobby*, 134 S.Ct. at 2761. The Court might find little difficulty in articulating a rational basis to support these laws. It would need to closely examine, however, whether a policy that grants religious adherents sweeping power to avoid compliance with generally applicable laws, yet denies that same power to non-religious objectors, no matter how sincere and deeply felt their objections, can survive strict scrutiny.

State policies may require reexamination as well. As noted above, for instance, Missouri law exempts church-owned child-care centers like Trinity Lutheran's from licensure requirements,[5] whereas

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[5] Despite its statutory exemption, Trinity Lutheran has voluntarily chosen to acquire a state license. Pet. App. at 131a.

the church's non-religious competitors are required to obtain and maintain a license to operate. Mo. Rev. Stat. § 210.211. Like the religious-exemption to employment-discrimination laws at issue in *Amos*, the licensure exemption is rationally justifiable in that it limits potential governmental interference with the exercise of religion. *Cf. Amos*, 483 U.S. at 339. It is less clear that the government's interest in granting this exemption to a generally-applicable safety regulation is compelling, however, or that the exemption is narrowly tailored to serve that interest.

The State has a legitimate interest both in prohibiting the direct payment of public resources to religious organizations and in providing special accommodation to religious entities to ensure that their religious practice is free of undue interference. This Court should decline Trinity Lutheran's invitation to upend decades of settled law and instead reaffirm that a state policy treating religious and non-religious groups differently does not offend the Equal Protection Clause as long as the policy is supported by a rational basis.

B. The exclusion of religious organizations from eligibility from the State's playground-resurfacing subsidy program is supported by a rational basis.

In conducting rational-basis review, this Court will overturn a government policy only if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only

conclude that the [government's] actions were irrational." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000). The challenged policy carries with it "a strong presumption of validity,[. . .] and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993); *see also Dandridge v. Williams*, 397 U.S. 471, 485 (1970) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."). Further, it is not necessary that the policymaker ever actually articulate the purpose or rationale supporting the classification at issue, *id.* at 315 (citing *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992)), and it is "entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315. "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Id.* (citations omitted).

Here, the State's policy prohibiting expenditures from the State's treasury to a church is amply supported by a rational basis. Like the Establishment Clause itself, the State's policy protects against governmental favoritism, actual or perceived, toward particular religious denominations, respects taxpayers' freedom of religion and conscience, and protects religious organizations from creeping government influence. *See, e.g.*, Nelson

Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1272-74 (2008).

First, the State's policy categorically excluding all churches and religious organizations from receiving state funds prevents politicians and program administrators from exhibiting, or appearing to exhibit, favoritism toward particular religious denominations. As this Court has observed, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). And in a competitive grant program like the State's playground-resurfacing grant, preferential treatment is inherent in the process—some applicants will receive funding and others will not, even if all are "qualified." By categorically excluding churches from eligibility, the government avoids the problem of funding Catholics but not Lutherans, or Methodists but not Muslims. *See Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971) (noting that where state funding program benefitted "relatively few religious groups," "[p]olitical fragmentation and divisiveness on religious lines are . . . likely to be intensified"); *cf. Town of Greece v. Galloway*, 134 S.Ct. 1811, 1841-42 (2014) (Kagan, J., dissenting) (arguing that town's practice of opening board meetings with a prayer, most of which were Christian in nature, diminished the "First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government.").

The use of facially neutral criteria in the decision-making process cannot wholly alleviate the risk of

perceived favoritism. Even neutral criteria, fairly applied, can have a disparate, negative impact on less-advantaged groups. *Cf. Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (finding unlawful for employment discrimination purposes any practices, procedures, or tests that "are fair in form, but discriminatory in operation."). For example, one factor on which Trinity Lutheran's playground-resurfacing grant application was scored was expected utilization—Trinity Lutheran was asked to "[d]escribe the number of people served by the project and the approximate geographic area of Missouri that will benefit from the project." Pet. App. at 121a. This is a reasonable, facially neutral criterion for differentiating between applications for funding, and one might expect to see something like it in virtually any competitive grant process. But its inclusion will mean that churches with larger congregations will tend to prevail over small churches in funding contests every time. With repeated successes, the larger churches will appear to be preferred by the State over less popular denominations, even if selection criteria are facially neutral. The State may rationally wish to avoid the appearance of sectarian favoritism by entirely excluding churches from eligibility.

Trinity Lutheran worries that some children, aware that their church is ineligible for government-funded playground improvements, may wrongly be led to believe that they are "less worthy of protection simply because they enjoy recreation on a playground owned by a church." Pet. Br. at 42. If children expressed such concern, they might be comforted

to learn about our nation's longstanding legal tradition separating church and state and about the special legal protections churches enjoy to protect their independence and freedom from government intrusion. Adopting Trinity Lutheran's rule, on the other hand, could trouble a different subset of children—those who belong to denominations that cannot muster the resources to effectively compete for government funding. Those children might ask why they "are less worthy of protection" simply because they do not belong to the popular church down the street. The best answer those children could receive is, "A state employee thought the other church deserved it more." It is not irrational for the State to prefer the former hypothetical scenario to the latter.

Trinity Lutheran, citing *Widmar v. Vincent*, 454 U.S. 263, 278 (1981), argues that this Court has already determined that a state's anti-establishment interest, if such interest does not rise to the level of an actual Establishment Clause violation, is insufficiently compelling to justify discriminating against religious groups. Pet. Br. at 28-31. In *Widmar*, the Court held that a public university that provided access to its facilities for student-group meetings could not exclude religious groups from using such facilities. 454 U.S. at 267. The Court explained that because the university had created a public forum by opening its facilities for student use, the Free Speech Clause of the First Amendment prohibited the university from excluding religious groups absent a compelling state interest and narrowly tailored regulation. *Id.* at 268-70. Providing

"equal access" to religious groups would not violate the Establishment Clause, the Court reasoned, and whatever remaining interest the university had in excluding the religious groups was insufficient to overcome "the most exacting scrutiny" required by the university's content-based regulation of speech. *Id.* at 275-76.

Trinity Lutheran's reliance on *Widmar* is misplaced here for at least two reasons. First, *Widmar* involved the official creation of an open forum, implicating the free-speech rights of potential participants, whereas this case does not. For the reasons explained above, rational basis review applies in this case, not the strict scrutiny that applies when an open forum is closed to particular viewpoints. Second, the "open forum" created in *Widmar* was described as a generally available benefit—that is, it appears that any qualifying group who wished to use it would be permitted to do so, without having to compete for space. *Id.* at 264-65, 274. Because facility access did not appear to be awarded competitively, university decision makers would not risk providing preferential access to certain religious sects over others.

In this last distinguishing characteristic, this case is unlike the hypothetical Trinity Lutheran poses in which a state refuses to provide services such as police, fire, and ambulance protection to churches or religious organizations. Pet. Br. at 31. Such services truly are generally available benefits—when someone in need calls for help, the police respond without considering whether the caller has submitted a sufficiently competitive proposal.

Because discrimination is not inherent in the allocation of emergency services as it is in competitive grants, it would be difficult to articulate a rational basis for depriving religious groups of those services. Moreover, the provision of these emergency services might be considered so important that, if called upon to review the rationality of any policy cutting off such services for certain groups, the Court might require a substantial justification before affirming. *Cf. Plyler v. Doe*, 457 U.S. 202, 223-24 (1982) (holding that state's refusal to provide free public education to undocumented immigrant children was so damaging to the affected children that a substantial justification was needed). In short, withholding police or fire-protection services from a church would impose an incredible hardship on its members. Withholding funding for a new playground surface does not.

Second, the State may rationally decide that, to avoid requiring taxpayers to contribute funds to religious denominations whose values are different from their own, no public funds may be directed toward any churches or religious organizations whatsoever. By shaping policy consistent with the separation of church and state contemplated by the Establishment Clause, states can avoid the "divisive political potential" that follows when states make direct payments to religious groups. *See Lemon*, 403 U.S. at 622-23. The State may wish to respect the individual religious consciences of taxpayers and relieve them of the obligation to fund religious groups with beliefs or practices they find repellent. To do so without discriminating on the

basis of religious viewpoint requires the State to withhold funding from all religious organizations alike.

The State's interest in accommodating taxpayers' freedom of conscience serves more than the individual interests of those taxpayers—it is vital to the success of state programs. States develop grant programs because they want to motivate positive action. *E.g. Maher v. Roe*, 432 U.S. 464, 469-76 (1977) (noting that states have broad power to encourage through spending programs actions deemed to be in the public interest). If taxpayers protest a particular program because religious groups they oppose are getting tax dollars, the state objective advanced by that program is jeopardized. States thus have an interest in minimizing controversy over functional grant programs. Limiting eligibility to non-religious groups helps to advance that interest.

Finally, the people of Missouri have a rational interest in guarding against the increased probability of government interference with religious institutions that may accompany the receipt of government grants. "Throughout our Nation's history, religious bodies have . . . 'acted as critical buffers between the individual and the power of the State.'" *Hosanna-Tabor*, 132 S.Ct. at 712 (Alito, J., concurring) (citations omitted). To serve that function, "the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Id.* Infusing churches with public money threatens that important value. As this Court noted in *Lemon*, "[t]he history of government grants of a continuing cash subsidy

indicates that such programs have almost always been accompanied by varying measures of control and surveillance." 403 U.S. at 621. Justice Jackson warned in *Everson* that "[m]any groups have sought aid from tax funds only to find that it carried political controls with it[,]" and observed that "[i]t is hardly lack of due process for the Government to regulate that which it subsidizes." 330 U.S. at 27-28 (Jackson, J., dissenting).

Even a program as benign as the one at issue in this case opens the door to increased government control. Grant recipients must maintain and produce on demand financial records reflecting the expenditure of funds, and recipients must be prepared to defend the "appropriateness" of each expenditure. Pet. App. at 95a. Additionally, grant recipients are expected to craft curriculum and public statements to the satisfaction of state program administrators. Pet. App. at 122a-123a. Presumably, the more closely the applicant's message aligns with governmental interests, the better the applicant's chances of receiving the grant. To be sure, applicants voluntarily and knowingly choose to submit to this government interference in exchange for a financial reward. But the people of Missouri may reasonably be wary of programs that allow government to exert increased authority over religious institutions, whether the institutional leadership invites it or not. A broad "no-aid" provision like the one in Article I, Section 7 is a rational prophylactic against gradually increasing government interference with religious autonomy.

The State's interest in avoiding sectarian battles for public resources, protecting taxpayers from financially supporting groups they find objectionable, and shielding religion from intrusive government regulation is rational and legitimate. The exclusion of religious groups from eligibility from the playground-resurfacing grant program does not violate the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

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AND
BRIEFS,

NO. 15-577

In the

Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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CORPORATE DISCLOSURE STATEMENT

Petitioner Trinity Lutheran Church is a non-profit corporation, exempt from taxation under 26 U.S.C. § 501(c)(3). It does not have parent companies and is not publicly held.

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INTRODUCTION

The facts of this case are undisputed. The Department of Natural Resources ("DNR") discriminates—blatantly—on the basis of religious status. It proudly says so in its brief. One can hardly imagine a clearer case of discrimination than denying children a safe playground surface solely because they attend a religious preschool. Our Constitution prohibits reducing any group of citizens to second class status and excluding them from public life simply because they are religious. Yet the DNR does just that.

This case is not about subsidizing or preferring religion. Protecting children from sharp playground surfaces is as far as one can imagine from a religious benefit. Instead, this case is about prohibiting religious status discrimination which violates the Free Exercise and Equal Protection Clauses.

I. The Free Exercise Clause prohibits religious status discrimination.

This case hinges on the "noncontroversial principle... that the Free Exercise Clause requires neutrality." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 560 (1993) (Souter, J., concurring). As this Court has taught: "[T]he minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533. But by the DNR's own admission, "It is undisputed that the policy at issue in this case is not facially neutral—churches are, *by virtue of their religious character*,

ineligible for playground-resurfacing grant funding." Brief of Respondent ("Resp. Br.") at 29 (emphasis added).

The DNR also admits that Trinity Lutheran "was denied funding because of its *particular religious status*," and that its policy is one of "exclusion of religious organizations." Resp. Br. 14, 31 (emphasis added). These are direct admissions of religious status discrimination.

A. The Free Exercise Clause prohibits religious status discrimination whether or not government directly coerces or imposes criminal penalties on the exercise of religion.

The DNR claims that the Free Exercise Clause only applies when a law has a "coercive effect," or imposes a "criminal penalty." Resp. Br. 7. That argument was rejected by this Court nearly forty years ago in *McDaniel v. Paty*, 435 U.S. 618, 633 (1978) (rejecting the assertion that a "law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions [the receipt of a benefit] on its abandonment"). Here, churches cannot be excluded from public safety programs any more than ministers can be excluded from public office. Under the First Amendment, "prohibiting" the free exercise of religion means more than direct coercion or criminal penalties. *See, e.g., Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717 (1981) ("It is true that... [the law] does not compel a violation

of conscience. But, 'this is only the beginning, not the end, of our inquiry'").

The DNR relies heavily on *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). But this Court held in *Lyng* that the Free Exercise Clause applies to "not just outright prohibitions," but also to "indirect coercion or penalties on the free exercise of religion." *Id.* at 450. Indeed, *Lyng* stated that it is unconstitutional to "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449. The Court in *Lyng* cited *Sherbert v. Verner*, 374 U.S. 398 (1963), as an example of governmental action prohibited by the Free Exercise Clause because conditioning eligibility for government benefits on religious status has the "tendency to coerce individuals into acting contrary to their religious beliefs." *Id.* at 450.

In *Sherbert*, this Court held that discrimination in the provision of government benefits based on religious status violates the Free Exercise Clause because it pressures the faithful to choose between either following their religion or forfeiting equal access to benefits. The Court concluded that "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.* at 404; *accord Locke v. Davey*, 540 U.S. 712, 720-21 (2004) (noting that it would violate the Free Exercise Clause to "require students to choose between their religious beliefs and receiving a government benefit").

Building on *Sherbert*, this Court held in *McDaniel*, that conditioning the availability of benefits—legislative service in that case—on McDaniel's willingness to surrender his religious ministry, "effectively penalizes the free exercise of his constitutional liberties." 435 U.S. at 626. The DNR never distinguishes *McDaniel* or *Sherbert* and it substantially misreads *Lyng*.

The discrimination here is direct and explicit and it violates the Free Exercise Clause. The DNR singles out and excludes Trinity Lutheran solely because of its religious status. But the DNR cannot discriminate against church preschools in access to government safety funds any more than a state could choose to give Social Security checks only to atheists.

B. Trinity Lutheran Church is not seeking a subsidy of its religion but freedom from discrimination based on its religious status.

The DNR argues that Trinity Lutheran is seeking government subsidy of its religious activities. However, the playground is purely secular so it is implausible to argue that making it safer subsidizes religious activities. Indeed, the DNR concedes that the playground resurfacing is a "secular capital improvement project," and that the Scrap Tire Program is "benign." Resp. Br. at 21, 52.

Nearly seventy years ago, this Court held that the government may not exclude people of faith

"from receiving the benefits of public welfare legislation." *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947). This Court has reaffirmed that principle without fail in the years since. *Sherbert* reaffirmed that government could not condition the provision of governmental benefits on abandoning religious precepts. 374 U.S. at 404; *see also Thomas v. Review Board*, 450 U.S. 707, 717 (1981) ("Not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of religion, but the pressure upon [the employee] to forego that practice is unmistakable."); *accord Hobbie v. Unemployment Appeals Com'n.*, 480 U.S. 136, 140-41 (1987).

And in *Smith* the Court stated that "government may not ... impose special disabilities on the basis of religious views or religious status." *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 877 (1990). Likewise, in *Church of the Lukumi*, this Court held that the "Free Exercise Clause 'protect[s] religious observers against unequal treatment.'" 508 U.S. at 542 (quoting *Hobbie*, 480 U.S. at 148).

More recently, a plurality of this Court concluded that government is prohibited "from discriminating in the distribution of public benefits based upon religious status or sincerity." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality with Justices O'Connor and Breyer concurring) (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches*

Union Free Sch. Dist., 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981)).

The government, of course, is not required to provide a public benefit. But when it chooses to do so, it cannot condition eligibility upon foregoing the free exercise of religion. *See Sherbert*, 374 U.S. at 405-06. That principle is echoed in this Court's free speech jurisprudence concerning public fora where this Court has consistently held that: "[t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." *Widmar,* 454 U.S. at 267-68.

It misses the point for the DNR to argue that Trinity Lutheran is seeking a subsidy for religion. It is not. The playground is not religious. Rather, Trinity Lutheran seeks to prevent the DNR from discriminating against it within the Scrap Tire Program on the basis of its religious status, something the DNR concedes it does. *See* Resp. Br. 29. Allowing the government to deny a benefit on the basis of religious status means that a person's exercise of constitutional rights "would in effect be penalized and inhibited.... Such interference with constitutional rights is impermissible." *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (citing *Sherbert* and noting that this unconstitutional conditions principle applies in the free exercise context).

The DNR's reliance on *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), and *Harris v. McCrae*, 448 U.S. 297 (1980), is inapt. The Court

held in *Regan* that the prohibition in § 501(c)(3) of the Tax Code against substantial lobbying was constitutional because it applied to all non-profits equally. But the *Regan* Court acknowledged that things "would be different if Congress were to discriminate invidiously in its subsidies." *Id.* at 548. A law that allowed lobbying by anyone but religious nonprofits would surely fall outside *Regan's* bounds.

Similarly, in *Harris*, the Court upheld a general prohibition on funding certain abortions. But the Court noted that there would be a "substantial constitutional question" if Congress had attempted to withhold all Medicaid benefits simply because a woman had chosen to have an abortion. *Id.* at 317 n.19. That situation, in the Court's view, would be analogous to *Sherbert* because the government would be penalizing the woman for exercising a constitutional right. But that was not the case in *Harris*; accordingly, the Court stated that "[a] refusal to fund protected activity, *without more*, cannot be equated with the imposition of a 'penalty' on that activity." *Id.* (emphasis added). The "more" the *Harris* Court was talking about is the kind of discrimination present here. Moreover, the Court made abundantly clear that citizens have a constitutional "right to be free from invidious discrimination in statutory classifications and other governmental activity." *Id.* at 322. In short, there was no discrimination present in *Regan* or *Harris*. There is unquestionably here.

C. The DNR's religious status discrimination in the Scrap Tire Program is far afield from what this Court approved in *Locke v. Davey*.

The DNR argues that this case fits squarely within the Court's decision in *Locke v. Davey* but none of its arguments hold water.

1. The religious status discrimination present in this case distinguishes it from Locke.

The DNR asserts that this case is like *Locke* because a "minimal burden" exists that is akin to the "milder kind" of religious disapproval this Court allowed, *Locke*, 540 U.S. at 720, and, in the DNR's view, "there is not a single thing that Trinity Lutheran is... penalized for doing as a consequence of state action." Resp. Br. 14. But neither is true.

This Court has consistently held that religious status discrimination in the availability of government benefits is a penalty on religious exercise that violates the First Amendment. The Court referred to this principle in *Locke* when it stated that forcing students to "choose between their religious beliefs and receiving a government benefit" would be unconstitutional, echoing cases like *Sherbert*, *Thomas*, *Hobbie*, *McDaniel*, and others. *Id.* at 720-21.

Religious status discrimination was not present in *Locke*. Davey was not denied a scholarship based

on who he was or what he believed. Rather, he was denied a scholarship based on his intended course of study. The exclusion in *Locke* was on only one use of the Promise scholarship—pursuing a devotional degree in theology. *Id.* at 716-17. Otherwise, the program went "a long way toward including religion in its benefits." *Id.* at 724. Students could use the scholarships at "pervasively religious schools," and could even "take devotional theology courses" as part of their education. *Id.* The program only prohibited using the scholarship for pastoral training.

In contrast, the Scrap Tire Program's prohibition is a broad *per se* exclusion of all religion. The program does not include religion in its benefits at all. Instead, the DNR blatantly discriminates on the basis of religious status.

2. The religious status discrimination in the Scrap Tire Program has no historical anti-establishment roots.

The DNR argues that there are "strong historical roots" against direct money payments to churches akin to the anti-establishment interest that *Locke* identified in not funding the devotional training of clergy. Resp. Br. 15. But this Court has never gone so far as to invalidate neutrally available, secular benefits provided directly to religious organizations. Instead, this Court has stated that "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 746 (1976).

Over forty years ago, this Court recognized that "the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has been consistently rejected." *Hunt v. McNair*, 413 U.S. 734, 742-43 (1973) (citing cases). Through the years, the Court has approved many forms of aid that flowed directly to churches and other religious institutions. *See, e.g., Bd. of Educ. v. Allen*, 392 U.S. 236, 248 (1968) (upholding program loaning textbooks directly to church-related elementary schools); *Hunt*, 413 U.S. at 734, 749 (revenue bonds for religious school to build a cafeteria facility); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 657-58 (1980) (reimbursing church-sponsored schools for performing state-mandated testing and reporting).

The DNR's rationale has been rebuffed repeatedly by this Court—that money is fungible and a dollar given for playground resurfacing frees up money for other religious purposes. *See* Resp. Br. 16. This Court rejected this argument decades ago. *Hunt*, for example, noted that "the Court has not accepted the recurrent argument that all aid [to religious organizations] is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." 413 U.S. at 743.

One searches this Court's precedent in vain for a case allowing funding for the devotional training of clergy. The absence of such caselaw speaks to the "historic and substantial state interest" in prohibiting "taxpayer funds to support church

leaders, which was one of the hallmarks of an 'established' religion." *Locke*, 540 U.S. at 722, 725. In stark contrast, this Court's precedent is littered with cases allowing direct aid to religious institutions for purely secular activities like the playground safety upgrade at issue here. If there was such a strong anti-establishment interest in avoiding direct money payments to a church, one would find no such thing.

The differences between this case and *Locke* are plain considering the purely secular nature of the benefit and the many safeguards against advancing religion built into the program. For instance, the program does not provide unrestricted money directly to a church but reimburses monies already documented and expended for playground resurfacing. *See* Pet. App. 94a. The grant is a one-time grant and does not create an ongoing relationship with the State. *See* Pet. Br. Addendum at 2a. The grant application process is entirely secular. *Id.* at 9a-19a. Trinity Lutheran signed and submitted a completed application and wrote to the DNR making clear the religious ownership of the Learning Center and the secular use of the playground. Pet. App. 129a-130a, 132a-133a. The DNR responded by thanking Trinity Lutheran for its candor and then excluding it solely because of its religious status. *Id.* at 152a-153a. And it did so despite the fact that the benefit was for a safer playground surface at a school open to those of any and all faiths and a playground open to anyone after school hours. *Id.* at 133a. In short, this case is unlike *Locke* in all respects.

3. Religious status discrimination is unconstitutional regardless of whether it flows from a credible connection to a Blaine Amendment.

The DNR spends a great deal of space arguing that Article 1, § 7, has no credible connection to a Blaine Amendment. *See* Resp. Br. 15-22. But the outcome in *Locke* was not dependent on whether the Washington provision had a credible connection to the Blaine Amendment. The Court merely noted that it did not. *Locke*, 540 U.S. at 723 n.7. If Article 1, § 7, has a credible connection to the Blaine Amendment, that is simply additional evidence of the hostility to religion that already exists in the Scrap Tire Program's categorical exclusion. But the outcome of this case remains the same even if Article 1, §7, does not have such a connection. That is because the DNR engages in religious status discrimination, which this Court has invalidated or condemned in situations that have nothing to do with the Blaine Amendment. *See, e.g.*, *McDaniel*, 435 U.S. at 618.

Whether Article 1, § 7, has a credible connection to the Blaine Amendment is merely one way of distinguishing this case from *Locke*. There are numerous other ways of doing so. *See* Pet. Br. 35-42. Unlike in *Locke*, this case involves: (1) a generally available public benefit that is completely secular and that does not involve an inherently religious activity; (2) an unmistakable hostility to religion; and (3) a categorical exclusion

of religion that bars all religious preschools from even submitting an application.[1]

Moreover, there is, in fact, a credible connection between Article 1, §7, and the Blaine Amendment. *See* Amicus Br. of the Union of Orthodox Jewish Congregations of Am. at 13-18; Amicus Br. of Douglas Cty. Sch. Dist. & Douglas Cty. Sch. Bd. at 27-36; Amicus Br. of Inst. for Justice at 27-34.

Finally, Missouri is among the states with the most restrictive Blaine provisions. *See* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 587 (2003) (stating "Missouri teams an extensive prohibition on government aid to religious bodies and religious schools with another constitutional provision that mandates that the state educational fund be used only for the establishment and maintenance of 'free public

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[1] One amicus brief argues that abstention may be appropriate because the Missouri Supreme Court should construe its own Constitution. *See* Amicus Br. of Nat'l. Assoc. of Evangelicals. There is no need for abstention in this case for at least two reasons. First, the DNR's policy applying Article 1, § 7, is what Trinity Lutheran challenges under the First and Fourteenth Amendments, and how the DNR construes its meaning is unmistakable. In addition, the Missouri Supreme Court's interpretation of the state constitution is clear and spans a number of cases. *See, e.g., Paster v. Tussey*, 512 S.W. 2d 97, 101 (Mo. Banc 1974); *Harfst v. Hogan*, 163 S.W. 2d 609 (Mo. Banc 1942); *see also Widmar v. Vincent*, 454 U.S. 263, 275 n.16 (1981) (citing Missouri Supreme Court cases construing Article 1, § 7).

schools'"). Even the DNR admits that the Missouri Constitution contains a "broader 'no aid' provision" than that at issue in *Locke*. Resp. Br. 17. And it concedes that Missouri's adoption of Article 1, § 7, "expanded upon" the original Blaine Amendment concept of no funding for sectarian schools by also prohibiting funding for "any church, sect, or denomination of religion," *id.* at 20, and that it did so in the very year the federal Blaine Amendment was originally proposed. *Id.* at 16. Thus, Missouri's provision is connected to—but is even more extreme than—the Blaine Amendment.

4. Religious status discrimination is unconstitutional even in a merit-based government benefit program.

The DNR finally attempts to place this case within *Locke* by asserting that the Scrap Tire Program is a program of "limited availability" which it suggests allows administrators to make "subjective, discretionary decisions regarding who will receive funds and who will not." Resp. Br. 22-23. But the denial here was not discretionary and there is no dispute that Trinity Lutheran would have received the grant but for its religious status. *See* Resp. Br. 29. The sole reason Trinity Lutheran was denied was because it was a church, not because of limited funds or some murky exercise of discretion.[2] *See* Pet. App. 152a-153a.

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[2] Even where discretion is allowed, this Court should apply the high bar of *Sherbert* to the extent the State engages in

The argument also misses the point entirely. The DNR claims that its decision to deny Trinity Lutheran a grant was no different than if the church's application had been uncompetitive or the grant program had not been created at all. *See* Resp. Br. 23-24. But the discrimination occurs because Trinity Lutheran was not permitted to compete on an even footing with others solely because of its religious status. The DNR cannot ignore the undisputed facts that Trinity Lutheran's application scored higher than all but four other applicants and it would have received a grant if it were not a church.

Moreover, this Court has rejected the argument that scarce resources justify discrimination. *See Rosenberger*, 515 U.S. at 835. In *Rosenberger*, the Court held that "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." *Id.* The Court pointed out that it is "incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision [in *Lamb's Chapel*, 508 U.S. at 384,] indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." *Id.* The same is true here.

The point is not whether the Scrap Tire Program is one of general or limited availability

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individualized assessments regarding religion. *See Smith*, 494 U.S. at 884.

(as all government programs are) or contains discretion in the selection process. Because Trinity Lutheran met all the secular scoring requirements of the program, it was entitled to participate without being discriminated against because of its religious status.

D. Religious status discrimination violates the neutrality demanded by the Free Exercise Clause.

The DNR argues that the First Amendment does not require neutrality between religious and non-religious citizens. But this assertion cannot be squared with the essential rule that laws must be neutral and generally applicable to comply with the Free Exercise Clause. *See Church of the Lukumi*, 508 U.S. at 531. To be sure, whether the Free Exercise Clause always demands neutrality between religion and non-religion is not something the Court must decide here. All this Court must conclude is that government discrimination based on religious status violates the minimum degree of neutrality required by the Free Exercise Clause. Such discrimination "manifests patent hostility toward, not neutrality respecting, religion." *McDaniel*, 435 U.S. at 636 (Brennan, J., concurring).

In *Church of the Lukumi*, this Court explained that "the minimum requirement of neutrality is that a law not discriminate on its face." 508 U.S. at 533. Yet the DNR concedes that its policy facially excludes churches solely because they are

religious. The requirement of neutrality is not limited to instances where the government encounters a request for a "religious exemption," as the DNR claims. Resp. Br. 25. Religious status discrimination violates the First Amendment whether it occurs in a case involving denial of a government benefit, as in *Sherbert*, *Hobbie*, *Thomas*, or *McDaniel*, or whether it occurs in a case involving a government prohibition on religious conduct, as in *Church of the Lukumi*.

II. The religious status classification in the Scrap Tire Program violates the Equal Protection Clause.

The DNR makes a truly novel argument that the Equal Protection Clause of the Fourteenth Amendment does not treat "all religious groups" as a suspect class meriting strict scrutiny. Resp. Br. 32-44. But this argument is a straw man that directly contradicts this Court's precedent.

A. Discrimination against churches is discrimination based on religious status.

Initially, the DNR focuses on a proposed class of "all religious groups." But the class applicable in this case is that of a "church." It is undisputed that Trinity Lutheran was denied participation in the Scrap Tire Program solely because it is a church. *See* Pet. App. 152a-153a; Resp. Br. 29 ("[C]hurches are, by virtue of their religious

character, ineligible for playground-resurfacing grant funding."). Thus, the DNR discriminates against—in its own words—those of a "particular religious status." *Id.* at 14.

Because Trinity Lutheran is treated unequally solely because of its "particular religious status," it is clear that the DNR "classif[ies] along suspect lines like... religion," a practice that automatically requires strict scrutiny. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (noting that a law triggers strict scrutiny if it "is drawn upon inherently suspect distinctions such as... religion").

B. Religious status discrimination against even a class of all religions must meet strict scrutiny under the Equal Protection Clause.

This Court has never limited suspect classification to only "distinctions among religious denominations," as the DNR suggests. Resp. Br. 34. The DNR's argument is akin to suggesting the Equal Protection Clause would not reach an exclusion based on race—such as an exclusion of persons of Asian ancestry—but only disparate treatment of racial subgroups (such as an exclusion of those descended from the Han Chinese). Instead, "[t]he idea is a simple one: At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious,

sexual or national class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (internal marks omitted).

Indeed, the famous "footnote four" in *Carolene Products* included religion in the list of classifications deserving a "more searching judicial inquiry." *U.S. v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). The Court in that case pointed to *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), as involving a statute directed at "particular religious... minorities." *Id.* But the statute in *Pierce* was not limited to some religious groups, it burdened all religions generally. *See* Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 1006 (2013) (discussing the statute in *Pierce's* application to all religions generally).

The Court consistently cites "religion" when discussing suspect classifications that merit strict scrutiny. As the Court stated in *Smith*, "[j]ust as we subject to the most exacting scrutiny laws that make classifications based on race, ... so too we strictly scrutinize governmental classifications based on religion." *Smith*, 494 U.S. at 886 n.3. Governmental decisions "may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

The DNR's citations to *Locke* and *Johnson v. Robison*, 415 U.S. 361 (1974), do not support its

position that religion is not a suspect class. Both *Locke* and *Johnson* analyzed only whether the fundamental right to religion was violated under those particular facts presented. *See* Pet. Br. 24-26. Neither of those cases discussed whether religion was a suspect class.

The DNR's attempt to argue that a class of all religions does not meet the criteria of a suspect class advances a narrow view that focuses only on a particular religious group's experience. But this puts too fine a point on the issue. "[R]eligion itself is generally an inappropriate basis for classification because of the likely use of religious classifications to oppress religious minorities." Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1, 57 (1992). The history of religion has, unfortunately, been marked by persecution which shifts as different groups enjoy the toleration of society while others are disfavored, only to later have the tables turned. *See, e.g., Everson*, 330 U.S. at 9 (noting the shifting history of religious persecution and intolerance).

The point is not that certain groups are entitled to greater protection under the Equal Protection Clause simply because their particular denomination or sect had a more intense history of persecution or intolerance than others.[3]

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[3] The Lutheran denomination does have a well-known history of persecution. Martin Luther himself was threatened with legal penalties for his religious beliefs, including confiscation and burning of his writings. *See* 2 JUSTO L. GONZÁLEZ, THE

Instead, the Equal Protection Clause demands strict scrutiny of any classification based on religion as a whole because the history of religious persecution illuminates how easily religion—or certain aspects of it—can fall into disfavor.

Indeed, religion itself may be falling into disfavor. Citing studies of religious identification, one commentator concluded "that secularization, long anticipated in the United States, finally is making significant inroads." Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 CARDOZO L. REV. 1755, 1772 (2011). The resulting effect may be an increasing disfavor of religion. And, as the U.S. State Department reports, discrimination and persecution based on religion is global. *See* U.S. Dep't. of State, Bureau of Democracy, H.R. and Lab., International Religious Freedom Report 7 (2014) (stating that "[i]n every region during the year, discriminatory laws, repressive policies, marginalization, and discriminatory application of laws had a negative impact on the ability of groups and individuals to practice their faiths").

This is why the DNR's claim that religion is politically powerful misses the point. The free exercise of religion is enshrined in our Constitution and is protected by various laws to

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STORY OF CHRISTIANITY 27 (1985). And Lutherans from Salzburg fled to this country in 1734 to escape persecution. *See* EDWIN GAUSTAD & LEIGH SCHMIDT, THE RELIGIOUS HISTORY OF AMERICA 111 (2002).

serve as a barrier against religious persecution or governmental disfavor. After all, "[w]ho knows what kind of havoc legislatures could potentially wreak in the absence of those deterrents?" Calabresi & Salander, *Religion and the Equal Protection Clause*, 65 Fla. L. Rev. at 1009.

Besides, membership in a suspect class is not limited to the traditionally persecuted and powerless. *See, e.g., Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 290 (1978) (applying strict scrutiny in case involving race discrimination against white males who have historically not been politically powerless or persecuted); *see also Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 273 (1986) ("The Court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination").

The DNR argues that treating religion as a suspect class would result in the invalidation of laws benefiting or protecting religion. *See* Resp. Br. 41-44. This argument is exceedingly weak and presents an artificial choice that holds the First Amendment hostage to the Fourteenth. No case the DNR cites holds anything close to what it argues. Instead, this Court has always drawn a distinction between discrimination and benevolent neutrality to religion. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely

tolerance, of all religions, and forbids hostility toward any").

It is undisputed that the First Amendment "gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 697 (2012) (finding a ministerial exception from nondiscrimination laws that is only applicable to religious groups). This Court "has long recognized that the government may (and sometimes must) accommodate religious practices." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987). Such "benevolent neutrality" does not violate the Fourteenth Amendment. *Walz v. Tax Comm'n.*, 397 U.S. 664, 669, 673 (1970)).

In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), this Court stated that the appellate court "misread our precedents to require invalidation of RLUIPA [42 U.S.C. §§ 2000cc, *et seq.*,] as 'impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights.'" 544 U.S. at 724. The Court then pointed to *Amos* for the proposition that religious accommodations "need not 'come packaged with benefits to secular entities.'" *Id.* (quoting *Amos*, 438 U.S. at 338). Protecting religion in some instances does not require that the government be hostile to religion in others.

C. The DNR's religious status discrimination cannot meet strict scrutiny, nor is it supported by any rational basis.

The DNR never attempts to justify the religious status discrimination in the Scrap Tire Program under strict scrutiny. Nor can this kind of discrimination meet that standard. The DNR's lack of argument effectively concedes the point.

Instead, the DNR focuses solely on rational basis. But it does so abstractly, focusing on Article 1, § 7, on its face. However, Trinity Lutheran challenges the DNR's application of Article 1, § 7, not its very existence. This errant focus fundamentally misapplies the rational basis test. *See U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 184 (1980) (stating that: "[w]hen faced with a challenge to a legislative classification under the rational-basis test, the court should ask, first, what the purposes of the statute are, and, second, whether the classification is rationally related to achievement of those purposes"). Here, the purposes of the Scrap Tire Program are to reduce scrap tires and promote playground safety. *See* Pet. App. 89a. The DNR's scoring of Trinity Lutheran's application—fifth out of forty-four applications—is a conclusive determination that Trinity Lutheran advances the purposes of the program better than all but four other applicants.

The DNR's other bases for its religious status discrimination bear no rational relationship to any of its asserted interests.

First, the DNR claims that "preferential treatment is inherent" in a competitive grant process like the Scrap Tire Program. Resp. Br. 46. But excluding *all* churches is like using a chainsaw to trim a bonsai tree. Equal treatment is, by definition, not favoritism and the scoring requirements of the program ensure fair dealing. *See* Pet. Br. Addendum 9a-19a. The scoring criteria include things like the percentage of use of scrap tires generated in Missouri, how the material will be contained in the playground, and an evaluation of the poverty level of the surrounding area. *Id.* Even in the case of a tie the applicants are selected in a random draw. *Id.* at 19a. The application process is undeniably fair and there is no rational perception of favoritism.

The DNR also argues that the limited availability of the program distinguishes it from the open forum in *Widmar v. Vincent*, 454 U.S. 263 (1981), or from benefits like police and fire protection. Resp. Br. 48-50. But government funding is always limited and this Court has never assigned any constitutional significance to that fact. The open forum in *Widmar* was limited by the space and the money to operate the buildings. Likewise, police and fire protection are limited by funding decisions. It is just as likely that denominational favoritism could exist in these instances as it would in the Scrap Tire program. It is irrational to

categorically exclude all churches from the program as a means of pursuing denominational equality. Moreover, this case is not about religious denominations squabbling over limited government funds; rather, it is about *eligibility* and whether religious organizations can compete on an even playing field.

Third, the DNR argues that a religious exclusion furthers its interest in protecting taxpayers from being required to "contribute funds to religious denominations whose values are different than their own." Resp. Br. 50. But there is no stopping point in this argument and it could just as easily apply to prohibiting police and fire protection or street and sidewalk creation and maintenance. The completely secular nature of the program makes any particular conscience objection to Trinity Lutheran's participation unreasonable at best.

Finally, the DNR's asserted interest in avoiding government control and surveillance of religious institutions bears no rational relationship to its religious exclusion. It is remarkable that the DNR raises its own anticipated misconduct to justify discrimination when the solution is for the DNR to not engage in the misconduct in the first place. The program's requirements are already tailored to prevent entanglement. The program is a one-time grant that only gives a reimbursement for money already expended. *See* Pet. App. 94a. The recordkeeping and reporting requirements are simple and do not allow the government to troll through religious beliefs or interfere with the

religious practice of a church. Given these realities, a categorical religious exclusion bears no rational relationship to preventing government control or interference with churches.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals and hold that categorically excluding Trinity Lutheran from the Scrap Tire Grant Program based solely on its religious status violates the church's free exercise and equal protection rights.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR, MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICUS CURIAE AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE

The American Association of Christian Schools (AACS) serves over 800 Christian schools and their students through a network of thirty-eight state affiliate organizations and two international organizations.[1]

AACS believes the Eighth Circuit's decision below improperly misconstrued this Court's jurisprudence interpreting the Free Exercise and Equal Protection Clauses. AACS is concerned that the erroneous decision, if upheld, could have far-reaching, negative effects on the rights of religious organizations, such as churches and schools, to receive generally available government benefits. AACS thinks it is imperative for this Court to correct the decision below so as to avoid future infringements on religious liberty by the government without requiring a showing of a compelling governmental interest and narrow tailoring. Additionally, AACS believes this Court should confirm that religion as a whole, not just membership in a particular religion, is a suspect classification warranting strict scrutiny under the Equal Protection Clause.

Because AACS serves Christian schools and their students, AACS particularly is concerned with the impact of the Eighth Circuit's decision to the extent it would permit the government to disadvantage religious schools vis-à-vis other private schools.

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[1] No counsel for a party authored this brief in whole or in part. Nor did counsel for a party, a party, or anyone other than the amicus curiae or its counsel make a monetary contribution intended to fund the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk.

SUMMARY OF ARGUMENT

"[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer* v. *Board of Pub. Works of Md.*, 426 U.S. 736, 746 (1976). Indeed, the Free Exercise Clause precludes the government from "impos[ing] special disabilities on the basis of religious views or religious status." *Employment Div., Dep't of Human Res. of Ore.* v. *Smith*, 494 U.S. 872, 877 (1990).

Trinity Lutheran Church of Columbia (Trinity Lutheran) and The Learning Center, which Trinity Lutheran operates as a religious school, applied for a grant to fund the installation of safe, rubber playground surfaces that would serve to protect children who use its playground. The Scrap Tire Surface Material Grant Program is generally available to nonprofit organizations; however, Trinity Lutheran's application for a grant was denied by Missouri's Department of Natural Resources (Department) solely because Trinity Lutheran is a church. The Department based its decision on a provision of the Missouri Constitution, which provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion." Mo. Const. art. I, § 7 (Section 7).

Trinity Lutheran challenged the rejection of its grant application as violative of the Free Exercise and Equal Protection Clauses, but the Eighth Circuit held that the Department did not violate either of these constitutional provisions. The Eighth Circuit's holdings were based on a misconstruction of this Court's precedents and should be reversed.

First, because the Department's policy (based on Section 7) of rejecting churches' grant applications is

neither neutral nor generally applicable, the proper test for evaluating the policy as applied to the denial of Trinity Lutheran's grant application is strict scrutiny, as established by this Court in *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993). The Department has not met this high burden, because it has not set forth a compelling governmental interest. This Court has stated that imposing greater separation of church and state than the Establishment Clause requires is not a sufficiently compelling government interest. *See Widmar* v. *Vincent*, 454 U.S. 263 (1981). But even were a compelling governmental interest present here, the denial of Trinity Lutheran's grant application because of its status as a church—irrespective of the particulars of the use to which the grant would be put—is not the narrow tailoring that strict scrutiny requires.

In support of its decision, the court below relied in part on *Locke* v. *Davey*, 540 U.S. 712 (2004), in which this Court upheld a scholarship program that prohibited students from using the scholarships to pursue devotional theology degrees. Reliance on *Locke* is inapt, however. In *Locke*, the state had a longstanding and specific interest in not funding the religious training of clergy. There are no such similar concerns here, where the grants may only be used for one secular purpose—to install scrap tire material on playgrounds.[2] Addi-

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[2] We note that a secular purpose is not required under the standard articulated in *Locke*, which contemplated that funding for religious activities may be acceptable. *See Locke*, 540 U.S. at 724-725 (noting the permissibility of students' using the scholarships while attending "pervasively religious schools" or taking devotional theology courses). Further, this Court has held on numerous occasions that the government is not the arbiter of what is secular or religious. *See Smith*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim."); *see also*

tionally, unlike in *Locke*, the Department here categorically excluded churches from participation in its program regardless of the use to which the playground is put and thus did not narrowly tailor its exclusion to any governmental interest. The *Locke* decision, if anything, highlights the problem with this application of Missouri's constitutional provision.

Furthermore, upholding the Eighth Circuit's decision could jeopardize government benefits for other religious organizations such as schools. This precedent could encourage states to require religious institutions to reimburse the state for even critical public services that are otherwise generally available. And it is not too hard to imagine a world in which the government could deny religious institutions access to many other generally available services simply because of the religious character of those institutions.

Second, the Department's discrimination against Trinity Lutheran on the basis of its status as a church violated the Equal Protection Clause. The Eighth Circuit erred in applying rational basis review to Trinity Lutheran's Equal Protection claim simply because its Free Exercise claim failed. To the extent that Trinity Lutheran's Equal Protection claim is premised on its membership in a suspect class, the court below should have analyzed the claim separately from its Free Exercise claim. And such a claim requires application of strict scrutiny given that religion is a suspect class. Because the Department was unable to set forth a compelling governmental interest to justify its discrimination against churches, and because the grant pro-

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Hernandez v. *CIR*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question ... the validity of particular litigants' interpretations of [their] creeds.").

gram was not narrowly tailored to advance any such interest, this Court should hold that the Department's conduct violated the Equal Protection Clause.

ARGUMENT

I. THE DEPARTMENT'S DECISION TO DENY A GRANT TO TRINITY LUTHERAN WAS UNCONSTITUTIONAL UNDER THE FREE EXERCISE CLAUSE

The Department's policy of denying churches' grant applications solely because of their religious status is, as applied to Trinity Lutheran, unconstitutional under the Free Exercise Clause. The Department's policy is premised on Section 7, which provides:

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

Mo. Const. art. I, § 7. The Department cited this state constitutional provision as its sole basis for denying the grant to Trinity Lutheran. The Department's decision was not based upon any religiously neutral or generally applicable criteria, and, but for the fact that it was a church, Trinity Lutheran would have received the grant. Under this Court's Free Exercise Clause precedent, the Department's application of Section 7 to deny the grant to Trinity Lutheran is subject to strict scrutiny.[3] Because the Department's conduct cannot meet

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[3] The Eighth Circuit incorrectly concluded that Trinity Lutheran's challenge to Section 7 was a facial challenge, instead of an

this exacting standard, the Court should hold that it violated the Free Exercise Clause.

A. The Department's Decision To Deny The Grant To Trinity Lutheran Is Subject To Strict Scrutiny

State action that is not neutral or generally applicable, such as the Department's policy of denying grant applications to religious institutions, must satisfy strict scrutiny under the Free Exercise Clause. In combination with *Smith*, *Lukumi* stands for the proposition that laws or other state actions that are not neutral or generally applicable are subject to strict scrutiny. *See, e.g.*, *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004) ("After *Smith*, it remains true that a law that is not neutral or generally applicable must undergo strict scrutiny."). Specifically, this Court held in *Lukumi* that official action "burdening religious practice that is not neutral or not of general application must undergo *the most rigorous of scrutiny*." *Lukumi*, 508 U.S. at 546 (emphasis added). As a result, such an action "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests" to satisfy the commands of

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as-applied challenge, and therefore held that Section 7 "does not conflict with the First Amendment or the Equal Protection Clause of the United States Constitution." Pet. App. 11a (citing *Luetkemeyer* v. *Kaufmann*, 64 F. Supp. 376 (W.D. Mo. 1973), *summarily aff'd*, 419 U.S. 888 (1974)). The court's conclusion was erroneous because Trinity Lutheran clearly brought an as-applied challenge. *See, e.g.*, *id.* 106a, 111a, 112a (alleging "Defendant['s] ... unconstitutional application of" Section 7); *id.* 109a, 110a (challenging "Defendant's actions in unconstitutionally enforcing [Section 7] by denying Plaintiff's grant application"). Therefore, the Eighth Circuit's analysis and holding were both inapt and incorrect, and this Court should properly analyze Trinity Lutheran's claims as applied to the Department's administration of the program.

the Free Exercise Clause. *Id.* (citing *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978)).

The Department's policy, based on Section 7, is neither neutral nor generally applicable with respect to religion. Accordingly, the Department's decision to deny the grant to Trinity Lutheran is subject to strict scrutiny, which requires that the Department's application of Section 7 "be justified by a compelling governmental interest and ... be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531-532. As this Court has recognized, such an action "that targets religious conduct for distinctive treatment ... will survive strict scrutiny only in rare cases." *Id.* at 546.

In *Lukumi*, the Court held that municipal ordinances that prohibited animal sacrifice unconstitutionally violated the free exercise rights of Santeria adherents, for whom "[t]he sacrifice of animals as part of religious rituals has ancient roots." *Lukumi*, 508 U.S. at 524. The ordinances were neutral because they used secular terminology that did not refer to religious practices. *Id.* at 534. The Court nonetheless applied strict scrutiny to the ordinances because the Court concluded, upon conducting a thorough analysis, that the ordinances, in fact, targeted religious conduct for differential treatment and were not generally applicable. *See id.* at 533-542.

Here, unlike in *Lukumi*, there is no need for the Court to evaluate the motive underlying the denial of the grant application because the Department plainly stated the basis for its denial, namely the requirements of Section 7. In this case, the Department explicitly singled out churches and other religious entities for differential treatment; in fact, they are targeted and excluded on the basis of the religious practices in which

they are engaged. There is also no question that the Department's decision is not generally applicable for the same reason: it prohibits aid to churches and other religious entities only. As the Court recognized in *Lukumi*, "[n]eutrality and general applicability are interrelated, and ... failure to satisfy one requirement is a likely indication that the other has not been satisfied." 508 U.S. at 531.

As the Department has conceded, *but for* Trinity Lutheran's status as a church, it would have received the grant. *See* Br. in Opp. 2. As a result, the Department's denial of Trinity Lutheran's grant application was not the result of a religiously neutral decision based on a generally applicable rule of decision.

B. The Department's Policy As Applied To Trinity Lutheran Did Not Satisfy Strict Scrutiny

Because the denial of Trinity Lutheran's grant application was not based on religiously neutral grounds, that decision must satisfy strict scrutiny, meaning that the Department's decision "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531-532. The Department has not carried its burden of meeting that standard here. Excluding Trinity Lutheran from participating in an otherwise generally available program that offers grants for playground surfacing does not further a compelling government interest and is not narrowly tailored to achieving any compelling government interest. Invoking Section 7 to deny the grant to Trinity Lutheran cannot satisfy strict scrutiny.

1. The Department has not set forth a compelling governmental interest

The Department has asserted an interest that is not compelling in the First Amendment context. In its motion to dismiss, the Department asserted an interest in Missouri's "insistence on a high degree of separation of church and state," which it characterized to be "arguably higher than that required by the First Amendment." Mot. to Dismiss 3, Dist. Dkt. 9. The Department cited one decision, a district court decision from 1973, to support the proposition that this interest is a compelling one: *Luetkemeyer* v. *Kaufmann*, 364 F. Supp. 376, 386 (W.D. Mo. 1973), *summarily aff'd*, 419 U.S. 888 (1974). In *Luetkemeyer*, a district court upheld a Missouri statute that provided transportation for students to and from public schools but not "church-related schools." *Id.* at 377. While the district court did conclude that "the long established constitutional policy of the State of Missouri, which insists upon a high degree of separation of church and state to probably a higher degree than that required by the First Amendment, is indeed a 'compelling government interest,'" *id.* at 386, its conclusion is significantly undermined by later Supreme Court precedent that makes clear that imposing greater separation of church and state than the Establishment Clause requires is not a sufficiently compelling government interest under the First Amendment.

For example, in *Widmar* v. *Vincent*, this Court considered the constitutionality of a University of Missouri-Kansas City (UMKC) regulation that closed facilities it made generally available to registered student groups to one particular registered student group that sought to use those facilities for "religious worship and religious discussion." 454 U.S. at 264-265, 277. UMKC

asserted that the regulation at issue furthered its interest in "maintaining strict separation of church and State" under both the United States and Missouri constitutions. *Id.* at 269. The Court affirmed the Eighth Circuit's decision that the regulation was not justified by a compelling interest and thus was unconstitutional. *See id.* at 267, 275-276. Specifically, the Court concluded that a state interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution [] is limited by the Free Exercise Clause[.]" *Id.* at 276. So too here the Free Exercise Clause limits the Department's stated interest in maintaining a high degree of separation of church and state. *See also Kreisner* v. *City of San Diego*, 1 F.3d 775, 779 n.2 (9th Cir. 1993) ("[E]ven though the California Constitution's provision prohibiting governmental establishment or preference of religion may be broader than the United States Constitution, it, like the Establishment Clause of the Federal Constitution, must be limited by the Free Exercise Clause[.]"). The Department's denial of the grant to Trinity Lutheran, therefore, fails strict scrutiny for the simple reason that it does not put forward a cognizable compelling interest.

Even if the Court were to conclude now that Missouri has an interest in "achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution," *Widmar*, 454 U.S. at 277, that interest is less than compelling when applied to the facts of this case. In fact, it is far less "substantial" than the State's interest in *Locke*.

In *Locke*, "the only interest at issue ... [wa]s the State's interest in not funding the religious training of clergy." 540 U.S. at 722 n.5. The Court noted that "majoring in devotional theology is akin to a religious call-

ing as well as an academic pursuit." *Id.* at 721. Citing the historical concerns about the use of taxpayer funds to "support church leaders," *id.* at 722, the Court characterized that governmental interest as "historic and substantial." *Id.* at 724. In fact, the Court could "think of few areas in which a State's antiestablishment interests come more into play." *Id.* at 722.[4]

The Department has not asserted the existence of any such "historic and substantial state interests." In this case, there are no specific antiestablishment concerns similar to Washington's longstanding "interest in not funding the religious training of clergy." *Locke*, 540 U.S. at 722 n.5.[5] Trinity Lutheran seeks to ensure that

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[4] *Locke* "suggests, even if it does not hold, that the State's latitude to discriminate against religion is confined to certain 'historic and substantial state interest[s],' and does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008) (internal citation omitted; brackets in original). Further, the Court's "holding that 'minor burden[s]' and 'milder' forms of 'disfavor' are tolerable in service of 'historic and substantial state interest[s]' implies that major burdens and categorical exclusions from public benefits might not be permitted in service of lesser or less long-established governmental ends." *Id.* at 1255-1256 (brackets in original). The Eighth Circuit's opinion rests, in part, on "existing precedent" that does not appreciate these limitations to the Court's analysis in *Locke*. *See* Pet. App. 12a (citing *Bronx Household of Faith* v. *Board of Educ. of N.Y.*, 750 F.3d 184, 198 (2d Cir. 2014), and *Eulitt ex rel. Eulitt* v. *Maine, Dept. of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004)).

[5] The Eighth Circuit suggested that, in this case, Trinity Lutheran sought "to compel the direct grant of public funds to churches," which the court characterized as "another of the 'hallmarks of an "established" religion.'" Pet. App. 10a. However, as Judge Gruender noted in his dissent, this Court "has sustained a number of neutral aid programs that distributed aid directly to religious organizations—without filtering the aid through private choice—

children playing on its playground are safe. Unlike the state's interest in *Locke* in ensuring that its funds not be used for religious training of clergy, there is nothing uniquely religious about playgrounds, even those at religious institutions, that would give the Department a compelling interest in limiting the use of its grants for such. The grant at issue is available through a secular, generally available program and may be used only for one secular purpose: "the cost, delivery, vendor installation of scrap tire surface material for playgrounds only."[6] Thus, the grants may not be used for religious purposes, such as to purchase religious materials, subsidize religious instruction, or train religious leaders. In no way is Trinity Lutheran seeking to use state funds for an "essentially religious endeavor." *See Locke*, 540 U.S. at 721. It is difficult to conceive in these circumstances how a reasonably objective observer could believe that the Department was endorsing religion or otherwise advancing religious practice by providing a grant so that children could play safely on a church playground. The Department's interest in this case is not sufficiently compelling to satisfy strict scrutiny.

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where the aid itself had no religious content and any actual diversion was de minimis." *American Atheists, Inc.* v. *City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 295 (6th Cir. 2009). "Although private choice is one way to break the link between government and religion, it is not the only way." *Id.*

[6] Dep't of Envtl. Quality, Missouri Dep't of Nat. Res., *Non-playground and Playground Scrap Tire Material Grants Fiscal Year 2015*, http://dnr.mo.gov/env/swmp/tires/nofa.htm (last visited Apr. 21, 2016).

2. The Department's decision was not narrowly tailored

Categorically excluding churches from participating in a public program that offers grants for playground surfacing so that children can play safely is also not narrowly tailored to achieving any alleged compelling government interest. In attempting to further the separation of church and state, the Department chose to use a sledgehammer when all it needed was a scalpel.

The Promise Scholarship Program, which the Court upheld in *Locke*, provides an example of a state program tailored to the asserted government interest at issue. The Promise Scholarship Program was tailored to "the State's interest in not funding the religious training of clergy," *Locke*, 540 U.S. at 722 n.5, because students were prohibited from using the scholarship funds *only* while pursuing "vocational religious instruction," *id.* at 725. Students could still use the scholarships while attending "pervasively religious schools," *id.* at 724, and students could also still use the scholarships to take devotional theology courses generally, *id.* at 725. Indeed, the only barred conduct was pursuing a degree in devotional theology, which the Court considered to be a "relatively minor burden" on scholarship recipients. *Id.*

Far from going "a long way toward including religion in its benefits," *Locke*, 540 U.S. at 724, the Department here demonstrated its disfavor of religion by categorically excluding churches from receiving otherwise neutral and generally available government benefits, even though, under the terms of the program, an institution receiving a grant may only use it for one secular purpose: installing scrap tire surface material for playgrounds.

In fact, the only way for Trinity Lutheran to receive generally available government benefits under the grant program would be for it to forgo its religious beliefs. *See, e.g., Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Thus, the grant program unconstitutionally subjects Trinity Lutheran to a Hobson's choice: either forgo its religious beliefs in order to receive generally available government benefits, or forgo the government benefits so that it may adhere to its religious beliefs.

Unlike in *Locke*, the Department categorically excluded churches from participation in its benefit program. The disfavor of religion the Department expressed was far from mild; it can only be characterized as intense.[7]

The grant program would be better tailored to furthering the Department's stated interest of separating church and state if it, for example, allowed the participation of churches in the Program so long as they did not use the public benefits for religious activities. Rather than carefully attempting to craft a program narrowly tailored to further its alleged interest of separating church and state, the Department missed the mark by categorically excluding churches like Trinity Lu-

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[7] Further, the Department subjects churches to differential treatment based upon their status as churches. The Department may not exclude Trinity Lutheran from participating in a generally available government program simply because it is a church. *See, e.g., Lukumi*, 508 U.S. at 533; *Smith*, 494 U.S. at 877 ("The government may not ... impose special disabilities on the basis of religious views or religious status[.]" (citing *McDaniel*, 435 U.S. 618 (1978))).

theran from receiving a grant. This action cannot withstand strict scrutiny under this Court's jurisprudence.

C. Upholding The Eighth Circuit's Decision Could Lead To Unreasonable And Incongruous Results

The Eighth Circuit stated that "the direct expenditure of public funds to aid a church is a paradigm example" of state action not required by the Free Exercise Clause. Pet. App. 12a. But allowing the state to withhold direct expenditures of generally available public funds to churches solely because they are churches without requiring the showing of a compelling governmental interest and narrow tailoring could lead to unreasonable and unprecedented results. As Justice Goldberg warned, an "untutored devotion to the concept of neutrality can lead to the ... approval of results which partake ... of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203 (1963) (Goldberg, J., concurring).

Government programs and services increasingly are becoming a part of American life. Entire sectors of the economy, such as healthcare and student loans, are becoming more dependent on government programs and services. And "as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality." *County of Allegheny* v. *ACLU*, 492 U.S. 573, 657-658 (1989) (Kennedy, J., concurring). Upholding the Eighth Circuit's decision could allow governments, in the name of neutrality, to deny religious

groups from large swaths of government programs and services.

The Eighth Circuit's decision, if it stands, could allow federal, state, and local governments to prohibit extending a number of different benefits critical to religious schools at the state level. This precedent could encourage states to require religious institutions to reimburse the state for even critical public services that are otherwise generally available and jeopardize certain state programs that provide healthcare services to students at religious schools.[8] Allowing the Eighth Circuit's decision to stand could allow for movement down the slippery slope toward preventing religious schools from receiving *any* governmental benefits, which could dissuade some families from sending their children to these schools and impede their free exercise of religion.

For example, it could have the unintended effect of allowing the government to prohibit the Department of Education from providing critical federal student loans, including Federal Pell Grants, to students admitted to attend religiously-affiliated schools, such as Brigham Young University, Georgetown, and Yeshiva University. The Department of Education's Public Service Loan Forgiveness Program, which forgives the entire remaining debt of federal student loan borrowers who work in full-time "public service" careers for 120 months, already excludes religious careers from its def-

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[8] For example, New Hampshire public schools provide health services to religious school students requesting such services. *See Opinion of the Justices*, 345 A.2d 415 (N.H. 1975) (advisory opinion).

inition of "public service" while still including full time employment at private not-for-profit organizations.[9]

And the potential impact is not limited to student loans, but to the continuation of religious higher education more broadly. Today, every American college student who requires a loan to fund his or her education has few private options outside of federal student loans unless he or she is willing to pay a premium. The federal student loan program has become so favorable, with benefits like fixed interest rates and income-based repayment plans, that financial experts and consumer advocacy groups (including the Consumer Financial Protection Bureau) advise student borrowers not to consider taking private loans until they have maxed out their federal loans.[10] As a result, many college students who require loans to afford college depend on government programs to continue their education.[11]

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[9] "For purposes of the full-time requirement, your qualifying employment at a not-for-profit organization does not include time spent participating in religious instruction, worship services, or any form of proselytizing." Office of Federal Student Aid, *Public Service Loan Forgiveness Program* 3, *available at* https://studentaid.ed.gov/sa/sites/default/files/public-service-loan-forgiveness.pdf (last visited Apr. 21, 2016).

[10] Consumer Financial Protection Bureau, *Should I choose federal student loans or private student loans?*, *available at* http://www.consumerfinance.gov/askcfpb/567/should-i-choose-federal-student-loans-or-private-student-loans.html (last visited Apr. 21, 2016) ("If you must take out student loans, federal student loans are the best option for the vast majority of borrowers. It is best to max out your federal student loan options before you borrow any private student loans.")

[11] Unlike private student loans, federal student loans do not require a credit check for applicants, and federal student loans offer special benefits such as income-based repayment plans, favorable default resolution options like loan rehabilitation and consolida-

Affirming the Eighth Circuit's decision could allow the government to foreclose students at Christian colleges from participating in student loan programs. These colleges could lose much more than just loan money—their research grant money, scholarships, and tax benefits could also be at risk.[12] There are currently very few colleges nationwide that do not receive any government money (and zero who do not benefit from the government in some way), and a decision affirming the Eighth Circuit's ruling could allow the government, should it see fit, to effectively close the doors of many of this country's educational institutions simply because of their religious character.[13]

Just as "no one would seriously contend ... that the Framers would have barred ministers from using public roads on their way to church," *Locke*, 540 U.S. at 727-728 (Scalia, J., dissenting), the Framers similarly

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tion, and even loan forgiveness. Office of Federal Student Aid, *What are the differences between federal and private student loans?*, *available at* https://studentaid.ed.gov/sa/types/loans/federal-vs-private (last visited Apr. 21, 2016). Also, all federal student loans charge a fixed rate (typically lower than private loans) and do not require a co-signer, while private student loans include variable rates (as high as 18%) and may require a co-signer. *Id.*

[12] For example, 52% of the $113 million Notre Dame received in research grants in 2014 was from the federal government. Fahey, *Notre Dame reports highest level of research funding in a non-stimulus year*, Notre Dame News, Sept. 19, 2014, *available at* http://news.nd.edu/news/50548-notre-dame-reports-highest-level-of-research-funding-in-a-non-stimulus-year/.

[13] Indeed, even religious colleges that do not accept federal funding benefit from the government in other respects. For example, religious colleges receive protection by police and fire departments, use government water and sewer systems, and rely on the upkeep of public roads or sidewalks providing access.

could not have envisioned a world in which the government could have barred Notre Dame's team bus from using the same public roads as the University of Southern California's team to travel to a Saturday night football game simply because of its religious affiliation.

This Court has recognized the dangers of an inflexible commitment to neutrality, and upholding the Eighth Circuit's decision could exacerbate those dangers not only for churches, but also for religious schools, hospitals, and other groups.

II. The Department's Denial Of A Grant To Trinity Lutheran Solely On The Basis Of Religion Violated The Equal Protection Clause Notwithstanding Whether It Violated Trinity Lutheran's Right To Free Exercise

The Eighth Circuit's opinion below incorrectly downgraded the Equal Protection Clause to merely a shadow incapable of operating apart from the Free Exercise Clause when the court stated that "in the absence of a valid Free Exercise claim, Trinity Church's Equal Protection Claim is governed by rational basis review." Pet. App. 12a. In other words, in the Eighth Circuit's view, because it held that the Department did not violate Trinity Lutheran's fundamental right to exercise freely its religious beliefs, Trinity Lutheran's Equal Protection claim was subject only to rational basis review and accordingly must fail. In so holding, the court below ignored Trinity Lutheran's basis for its Equal Protection claim—that it was improperly discriminated against because of its membership in a suspect class—which is not dependent on its assertion that the Department violated its Free Exercise rights. Furthermore, this Court has made clear that Equal Protec-

tion claims and Free Exercise claims are separate and distinct: A claim brought under one clause does not necessarily rise and fall with a claim brought under the other clause.

This Court should correct the Eighth Circuit's error and reiterate to the lower courts that each constitutional claim brought by a plaintiff warrants its own analysis. Moreover, this Court should hold that the Department's discrimination against Trinity Lutheran on the basis of its status as a religious entity violated the Equal Protection Clause because this disparate treatment of a suspect classification does not serve a compelling state interest and the program is not narrowly tailored to any such interest.

A. The Eighth Circuit Erred By Applying Rational Basis Review To Trinity Lutheran's Equal Protection Claim Instead Of Strict Scrutiny

1. The Equal Protection Clause requires strict scrutiny of governmental conduct that either violates a fundamental right or classifies along suspect lines

The Eighth Circuit failed to recognize that the Equal Protection Clause protects against two separate categories of governmental actions: (1) interference with the exercise of a fundamental right or (2) disadvantage of a suspect classification. When the government engages in either one of these two types of actions, its conduct must meet the exacting strict scrutiny standard. *See, e.g., Massachusetts Bd. of Ret.* v. *Murgia*, 427 U.S. 307, 312 (1976) ("[E]qual protection analysis requires strict scrutiny of a legislative classification ... when the classification impermissibly interferes with the exercise of a fundamental right or operates to the

peculiar disadvantage of a suspect class."). Strict scrutiny requires that a government action "must be narrowly tailored to serve a compelling governmental interest in order to survive." *Abrams* v. *Johnson*, 521 U.S. 74, 91 (1997).

Based completely on their own prerogative, plaintiffs may bring an Equal Protection challenge on the basis of an interference with a fundamental right, a suspect classification, or both. *See, e.g.*, *Stiles* v. *Blunt*, 912 F.2d 260, 264 (8th Cir. 1990) ("Appellant argues that the minimum age requirement should be subjected to strict scrutiny review because the requirement affects a suspect class and infringes on fundamental rights."). Therefore, for religious-based Equal Protection challenges, plaintiffs can argue that the government interfered with their fundamental right to free exercise of religion and/or that they were disadvantaged due to a suspect classification predicated on religious grounds.[14] *See, e.g.*, *Wirzburger* v. *Galvin*, 412 F.3d 271, 282 (1st Cir. 2005) ("Plaintiffs argue that the Religious Exclusion violates equal protection guarantees because it infringes on the fundamental right to religious free exercise [and] disadvantages a suspect class."). Either one of these types of claims triggers strict scrutiny. *Murgia*, 427 U.S. at 312.

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[14] The free exercise of religion is certainly a fundamental right. *See Wisconsin* v. *Yoder*, 406 U.S. 205, 214 (1972). This brief, however, focuses on Trinity Lutheran's suspect classification claim.

2. The Eighth Circuit erred by applying rational basis review to Trinity Lutheran's Equal Protection claim in the absence of a valid Free Exercise claim

Rather than apply strict scrutiny to Trinity Lutheran's suspect classification Equal Protection claim, the Eighth Circuit applied rational basis review and summarily rejected the claim for the same reasons it had rejected Trinity Lutheran's Free Exercise claim. *See* Pet. App. 12a. This holding was based on a misconstruction of this Court's precedent and constitutes reversible error.

Trinity Lutheran brought a claim that the Department violated its Equal Protection rights because the Department denied Trinity Lutheran's grant application on the basis of a suspect classification. *See* Compl. ¶¶ 51-61, Dist. Dkt. 1; *see also id.* ¶ 55 ("Religion is a suspect class."). But instead of analyzing the claim separately, the court rejected the Equal Protection claim as concomitant with the Free Exercise claim, stating, "in the absence of a valid Free Exercise claim, Trinity Church's Equal Protection claim is governed by rational basis review." Pet. App. 12a n.3 (citing *Locke*, 540 U.S. at 720 n.3).

The Eighth Circuit's justification for its method of handling Trinity Lutheran's Equal Protection claim lacks support in this Court's precedent. The reliance on *Locke* is inapt because, in that case, the Court was merely addressing an Equal Protection claim premised on a classification that interferes with the *exercise of a fundamental right, not a claim premised on a classification that operates to the disadvantage of a suspect class*, as Trinity Lutheran argues here. Because the *Locke* Court held that the program at issue there

"[wa]s not a violation of the Free Exercise Clause," the Court applied "rational-basis scrutiny to [respondent's] equal protection claims." *Locke*, 540 U.S. at 720 n.3.

In so doing, the Court in *Locke* cited *Johnson* v. *Robinson*, 415 U.S. 361 (1974), as its sole authority. In *Johnson*, the petitioner argued both that the challenged classification interfered with the fundamental constitutional right to the free exercise of religion *and* that conscientious objectors were a suspect class deserving special judicial protection. *Id.* at 375 n.14. The Court analyzed these claims separately, first noting that since it had held "that the Act does not violate appellee's right of free exercise of religion," it could not apply to the fundamental right claim "a standard of scrutiny stricter than the traditional rational-basis test." *Id.* It then proceeded to *separately* analyze the claim that conscientious objectors were a suspect class. *Id.*

Thus, to the extent that *Locke* and *Johnson* can be read to make an Equal Protection claim dependent on the viability of a Free Exercise claim, this would be true when the Equal Protection claim is premised *only* on an interference with a fundamental right, as in *Locke*. But the Court in *Johnson* separately analyzed a suspect classification claim on its own terms. Thus, the Eighth Circuit erred in its reliance on *Locke* as support for applying rational basis review to Trinity Lutheran's suspect classification claim. An Equal Protection claim that is premised on a suspect classification stands alone and apart from any Free Exercise claim and is subject to strict scrutiny.

Furthermore, as a general matter, Equal Protection claims and Free Exercise claims are separate and distinct; a claim brought under one clause does not necessarily rise and fall with a claim brought under the

other. An Equal Protection claim premised on a suspect classification and a First Amendment claim premised on free exercise of religion are seeking unrelated remedies from different vantage points. The "individualized notion of impact is what constitutes the essential difference between adjudication under the free exercise clause and the equal protection clause." Lupu, *Keeping the Faith: Religion, Equality and Speech*, 18 Conn. L. Rev. 739, 765 (1986). Free Exercise claims are premised on protecting "autonomous, individual choices," whereas Equal Protection claims based on a suspect classification are "dependent on group membership." *Id.* Trinity Lutheran's suspect classification claim, therefore, must be evaluated in a completely separate manner from its Free Exercise claim.

A failure to evaluate separately Trinity Lutheran's suspect classification Equal Protection Clause claim wrongly creates "a blanket rule that where a Free Exercise claim fails, all equal protection claims based on the same facts must also fail." *Wirzburger*, 412 F.3d at 282 n.5. Rather, this Court should clarify that the *Locke-Johnson* "line of Supreme Court cases [applies] only to the extent that the related equal protection claims are based on a theory that the law or governmental action in question 'interferes with the fundamental constitutional right to the free exercise of religion.'" *Id.* (quoting *Johnson*, 415 U.S. at 375 n.14). Indeed, other types of Equal Protection claims, such as suspect classification claims, "may have independent force, and must be considered accordingly." *Id.* This Court should reaffirm this principle, as lower courts have strayed from it. *See, e.g.*, *Eulitt*, 386 F.3d at 354 ("In [*Locke*], the Supreme Court clearly rejected this type of effort to erect a separate and distinct frame-

work for analyzing claims of religious discrimination under the Equal Protection Clause.").

The Eighth Circuit erred by applying rational basis review to and summarily disposing of Trinity Lutheran's Equal Protection claim. This Court should clarify that courts must conduct a separate analysis for each constitutional claim.

B. The Department Violated The Equal Protection Clause By Discriminating Against Trinity Lutheran On The Basis Of Its Status As A Religious Organization

Analyzed properly on its own merits, Trinity Lutheran's Equal Protection claim triggers strict scrutiny if it evokes a viable suspect classification. "[E]qual protection analysis requires strict scrutiny of a legislative classification [] when the classification ... operates to the peculiar disadvantage of a suspect class." *Murgia*, 427 U.S. at 312. The Department rejected Trinity Lutheran's grant *solely* because of its status as a church, the quintessential religious organization. Thus, the Department's application of its program operated to the peculiar disadvantage of religious organizations because all churches would likewise be categorically barred from participating. And because religion is a suspect classification, the Department's classification therefore must pass the strict scrutiny test: "the government has the burden of proving that [the] classifications are narrowly tailored measures that further compelling governmental interests." *Johnson* v. *California*, 543 U.S. 499, 505 (2005). The classification at issue clearly fails this Court's "most rigorous and exacting standard of constitutional review." *Miller* v. *Johnson*, 515 U.S. 900, 920 (1995).

1. Religion is a suspect classification

To be deemed a suspect classification, a government's classification must be based on characteristics that are essential elements of personhood and focal points of discrimination. *See, e.g.*, Fitzgerald, *Towards a Modern Art of Law*, 96 Yale L.J. 2051, 2072 & n.9 (1987). "Establishing that religion is a 'suspect classification' for equal protection purposes is easy"; indeed, "it has always been *assumed* that classification based on religion is suspect." Gellman & Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Clause Cases (Not Just the Establishment Clause)*, 10 U. Pa. J. Const. L. 665, 707 (2008).

This Court has stated in several cases that religion is a suspect classification. *See, e.g.*, *Burlington N. R.R. Co.* v. *Ford*, 504 U.S. 648, 651 (1992) (Equal Protection Clause prohibits classification "along suspect lines like race or religion"); *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (Equal Protection Clause prohibits classifications "drawn upon inherently suspect distinctions such as race, religion, or alienage"). Circuit courts likewise have stated that religion is a suspect classification. *See, e.g.*, *Patel* v. *U.S. Bureau of Prisons*, 515 F.3d 807, 816 (8th Cir. 2008) ("Religion is a suspect classification."); *Ball* v. *Massanari*, 254 F.3d 817, 823 (9th Cir. 2001) (listing "race, religion, or national origin" as suspect classes). That religion is a suspect classification is essentially a truism.

Furthermore, religion should be considered a suspect classification regardless of whether "religion" is defined as an individual denomination or all religions together, such as here, where Trinity Lutheran was denied the grant solely because of its status as a religious organization. It is clear that "an individual reli-

gion meets the requirements for treatment as a suspect class." *Christian Sci. Reading Room Jointly Maintained* v. *City & Cnty. of S.F.*, 784 F.2d 1010, 1012 (9th Cir. 1986). This is so because individual religions are often "discrete and insular" minorities in need of "extraordinary protection from the majoritarian political process" such that classifications based on individual religions are inherently suspect. *See United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152-153 n.4 (1938) (noting that statutes directed at particular religious minorities must be subjected to "more exacting judicial scrutiny" under the Fourteenth Amendment).

But because the Court in "footnote four" of *Carolene Products* cited *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), which is "a case involving a law which burdened all religious groups generally," that footnote also demonstrates that "the Fourteenth Amendment banned laws targeting *all religion generally*, and not just laws targeting specific religious groups." Calabresi & Salander, *Religion and the Equal Protection Clause*, 65 Fla. L. Rev. 909, 1006 (2013) (emphasis added). Indeed, since *Carolene Products*, the Court has "time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship." *Board of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring). "This emphasis on equal treatment is ... an eminently sound approach" because constitutional provisions such as "the Equal Protection Clause as applied to religion ... speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Id.* Lower court decisions have demonstrated this principle as well. *See, e.g.*, *Peter* v. *Wedl*, 155 F.3d 992, 996 (8th Cir. 1998) (program

that allowed children who attended private nonreligious schools to receive government-funded special education services while barring the same services at religious schools was "[g]overnment discrimination based on religion" that violated the Equal Protection Clause).

These principles have led scholars analyzing this issue to the same, inescapable conclusion: Religion as a whole is a suspect classification. "[E]vidence indicates that classifications either targeting particular religions or distinguishing between religion and secularism will be subjected to strict scrutiny." Smith, Zelman's *Evolving Legacy*, 89 Va. L. Rev. 1953, 1995 (2003). Eugene Volokh agrees, further explaining that "equal treatment is constitutionally compelled: The government may not discriminate against people or institutions because of their religiosity." Volokh, *Equal Treatment is Not Establishment*, 13 Notre Dame J. L. Ethics & Pub. Pol'y 341, 365 (1999).

Religion as a whole, therefore, is a suspect classification, and this suspect classification was triggered by the Department's actions. Even though the Department denied Trinity Lutheran the grant because it is a religious organization (and not because it belongs to the Lutheran denomination or is a Christian church), this classification of organizations along purely religious lines is inherently suspect. Because the Department's actions worked to the disadvantage of a suspect classification, the Court must apply strict scrutiny to Trinity Lutheran's claim.

2. The Department's discriminatory administration of its program cannot withstand strict scrutiny

The Department fails at either step required to pass strict scrutiny. First, it cannot show a compelling gov-

ernmental interest. In the district court, the Department argued that "Trinity's exclusion from the aid program in this case was based on the Missouri Constitution's heightened separation of church and state." Pet. App. 70a. This Court, however, has held that the mere state interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution" is not "sufficiently compelling to survive strict scrutiny." *Widmar*, 454 U.S. at 276-277. The Department's classification, therefore, fails strict scrutiny for the simple reason that it does not put forward a cognizable compelling interest. *See, e.g., Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 757 (2007) ("Lacking a cognizable interest in remediation, neither of these plans can survive strict scrutiny because neither plan serves a genuinely compelling state interest.").

Even if the Department could somehow put forward a compelling interest, the "government is still constrained in how it may pursue that end: The means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Grutter* v. *Bollinger*, 539 U.S. 306, 333 (2003). "The purpose of the narrow tailoring requirement is to ensure that the means chosen fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate [] prejudice or stereotype." *Id.* (internal quotation marks and alterations omitted). When evaluating the narrow tailoring of the classification, the Court must determine whether the Department's program ensures "that each [grant] applicant is evaluated as an individual [entity] and not in a way that makes an applicant's [religion] the defining feature of [its] application." *Fisher* v. *Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

The Department did not properly evaluate Trinity Lutheran's application and thus its grant program was not narrowly tailored regardless of the existence of any compelling interest. Trinity Lutheran was advised that its application ranked fifth out of forty-four applications in 2012. Pet. App. 3a. Fourteen projects were funded that year, but Trinity Lutheran's was not one of them. *Id.* In a letter, the Department gave one sole reason for its rejection of Trinity Lutheran's application: After "further review of applicable constitutional limitations, the department is unable to provide this financial assistance directly to the church as contemplated by the grant application" due to the fact that "Article 1, Section 7 of the Missouri Constitution specifically provides that 'no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, section or denomination of religion.'" *Id.*

The fact that Trinity Lutheran was fifth on the Department's list shows that it was qualified for the program, and would have received one of the fourteen grants awarded in 2012 *but for* its status as a religious organization. This means that when evaluated as an individual institution, Trinity Lutheran was qualified for the program, but its status as a church prevented it from receiving a grant. This sort of evaluation of an institution based on nothing more than its status as a religious organization patently fails the narrow-tailoring requirement. *See Fisher*, 133 S. Ct. at 2420.

Trinity Lutheran applied for a grant to improve its playground—a clearly secular purpose. The Department did not consider that purpose, however; rather, it simply rejected Trinity Lutheran's application because it was a church. Narrow tailoring in this context would require consideration of whether the particular expenditure serves to establish religion. *See Grutter*, 539

U.S. at 333. Because the Department did not take this into account, its program is not narrowly tailored.

Trinity Lutheran brought a suspect classification Equal Protection claim, which stands apart from any Free Exercise claim it also brought. When properly evaluated under strict scrutiny, Trinity Lutheran's claim that the Department improperly discriminated against it on the basis of its status as a religious organization—a suspect classification—must succeed. The Department has identified no viable compelling interest and, even if it had, its program is certainly not narrowly tailored to any viable interest. Thus, this Court must hold that the Department violated the Equal Protection Clause when it denied the grant to Trinity Lutheran solely on the basis of religion.

CONCLUSION

The judgment of the Eighth Circuit should be reversed.

Respectfully submitted.

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TRINITY LUTHERAN CHURCH OF COLUMBIA,

Petitioner,

v.

SARA PARKER PAULEY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), addressing a variety of issues of constitutional law. The ACLJ is dedicated, *inter alia*, to religious liberty and freedom of speech.

SUMMARY OF ARGUMENT

In the distribution of entirely secular benefits (like playground safety resurfacing), the government may not discriminate against otherwise eligible private entities solely on the basis of their religious identity. That norm controls this case.

ARGUMENT

When pursuing a legitimate goal, like childhood safety, government may, and often does, employ a grant program that reimburses private entities for their actions furthering the government's goal. What the government may *not* do is discriminatorily exclude

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[1] The parties in this case have consented to the filing of this brief. A copy of the consent letter of respondent is being filed with this brief. The blanket consent of petitioner is on file with this Court. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

otherwise qualified, eligible entities solely because of their religious identity. This norm follows from much of this Court's jurisprudence. The state of Missouri, and the court below, nevertheless declared that petitioner Trinity Lutheran Church (TLC) could be disqualified, from a secular child safety program (resurfacing playgrounds with recycled automobile tire rubber), *solely because TLC is a church*. This Court should reverse the judgment below.

I. IT IS UNCONSTITUTIONAL INVIDIOUSLY TO DISCRIMINATE IN A SECULAR BENEFITS PROGRAM AGAINST AN OTHERWISE ELIGIBLE ENTITY SOLELY BECAUSE OF ITS RELIGIOUS IDENTITY.

There is nothing remarkable about the proposition that express governmental discrimination, in a secular benefits program, against an otherwise qualified entity, solely because of that entity's religious identity, is generally unconstitutional.

The Constitution "forbids hostility" toward "all religions," *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). "State power is no more to be used so as to handicap religions than it is to favor them." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). The Establishment Clause "commands that . . . [a state] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Id.* at 16. *See also Members of Jamestown Sch. Comm. v. Schmidt*, 699 F.2d 1, 16-17 (1st Cir. 1983) (Breyer, J., concurring in result) (noting, where benefit at issue "is support for

child safety rather than support for the church," that "[t]he First Amendment, after all, is impartial . . ., and that impartiality implies that it not penalize parochial school students").

This Court has therefore held that it violates the First Amendment (specifically, the Free Exercise Clause) to target clergy for special political disabilities. *McDaniel v. Paty*, 435 U.S. 618 (1978). This Court has likewise held, in the context of a speech forum, that it violates the First Amendment to exclude an entity because of its religious message, *e.g.*, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), including when a funding program is at issue, *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

This Court has also held that the Equal Protection Clause commands that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), and that discrimination against an entity because of its exercise of a fundamental right – here, the religious expression and association that define a church – triggers strict scrutiny under the Equal Protection Clause. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (classifications affecting fundamental rights trigger strict scrutiny). *A fortiori*, restrictions that rest on no more than "a bare desire to harm" a particular group are impermissible, *Cleburne*, 473 U.S. at 446-47 (citing *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

It follows that a government's posting of a "no churches, synagogues, or mosques allowed" sign, whether literal or figurative, would run afoul of both

the Equal Protection Clause and the religion and speech[2] clauses of the First Amendment.

The consequences of a contrary ruling would be to authorize gratuitous hostility against religious entities and those they serve, including children. Use of public parks could be free except for church picnics. Tours of museums could be free for all student groups except for religious schools. A government transportation agency could allow free (and thus subsidized) use of express lanes by HOV vehicles except for church buses.

Indeed, this case already *is* the extreme hypothetical: a state could deny playground safety resurfacing grants to otherwise qualified recipients, at the expense of the children using those playgrounds, solely because of their religious identity.

Such a rule is not just a massive overreaction to establishment concerns, *see Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in judgment) ("the First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent") (internal quotation marks omitted), but is downright constitutional anathema and, in a land settled by believers seeking religious freedom, both ahistorical and ironic. This Court should reverse the Eighth Circuit.

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[2]Petitioner TLC brings its challenge under the Free Exercise and Equal Protection Clauses. While TLC apparently does not directly maintain a Free Speech attack, the standards for reviewing discrimination against a religious message or viewpoint are the same under the Free Speech and Equal Protection Clauses. *E.g.*, *Carey v. Brown*, 447 U.S. 455, 463 (1980); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 n.4 (1992).

II. *LOCKE v. DAVEY* PROVIDES NO SOLID FOOTING FOR A CONTRARY RESULT.

The Eighth Circuit relied upon ambiguity in this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), as supplying a basis for the supposed constitutionality of a "no churches" rule. The Eighth Circuit's view of *Locke* is by no means inevitable, as a more sensible, contrary holding in the Tenth Circuit illustrates. *See Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008) (condemning "the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support"). Nor is the Eighth Circuit's reading of *Locke* sound.

Locke worked no revolution in constitutional jurisprudence. *Locke* did not purport to overturn any of this Court's precedents. Nor did it challenge the notion that discrimination against churches as such would violate the Constitution. *See* 540 U.S. at 724 (distinguishing government action "evincing hostility toward religion"). To the contrary, *Locke* expressly distinguished a situation like the one here, where someone or something had "to choose between their religious beliefs and receiving a government benefit." *Id.* at 720-21.

Moreover, the *Locke* decision represents an especially ill-suited candidate for the construction of a new, church-antagonistic body of law.

A. THE *LOCKE* DECISION IS ITSELF QUESTIONABLE.

At issue in *Locke* was a state's decision to deny a scholarship to an incoming college student who had announced his intention to pursue a major in devotional theology. 540 U.S. at 716-17. The majority ruled that this denial reflected a historically based refusal to use tax money to fund the training and maintenance of clergy. *Id.* at 722-23 & n.6. To be sure, that "historic and substantial" concern, *id.* at 725, was real. However, that concern addressed a *special privilege* being afforded to clergy, not a *common benefit* being denied to clergy. In other words, the state's boot in *Locke* did not match the historical footprint.

There is a huge difference *in kind*, not just in degree, between doling out a special benefit to a select profession (i.e., clergy) and singularly denying an otherwise generally available benefit (i.e., scholarships) only to the select group. The first is a privilege; the second is blatant discrimination. *See id.* at 727 (Scalia, J., dissenting) ("Davey is not asking for a special benefit to which others are not entitled. . . . He seeks only equal treatment").

The *Locke* majority sought to counter this disconnect between the state interest and the challenged restriction by asserting that "training for religious professions and training for secular professions are not fungible," and that "[t]raining someone to lead a congregation is an essentially religious endeavor." *Id.* at 721. There is some truth to

this. But there are also problems.[3] Most relevant here, however, the concern *Locke* identified is absent from this case. Like "police and fire protection, sewage facilities, and streets and sidewalks" offered equally to all entities, *Board of Educ. v. Allen*, 392 U.S. 236, 242 (1968), playground surfacing is not "support of a religious institution," *id.*, under the Establishment Clause, and certainly not "essentially religious," *Locke*, 540 U.S. at 721. If under *Everson*, "proportionate state expenditure on school transportation is support for child safety rather than support for the church," *Members of Jamestown Sch.*, 699 F.2d at 16 (Breyer, J., concurring in result), then even more clearly

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[3]The *Locke* majority's rejoinder proves far too much. The same could be said of countless other acts: uttering a prayer to God vs. uttering a request to government; carrying a religious icon in procession vs. carrying a political banner; wearing a snow cap vs. wearing a yarmulke; growing a long beard for health or style vs. growing a beard for religious reasons. In each such case, to single out the religious act for restraint, when the comparable (and, in secular terms, indistinguishable) act is not so restrained, is antireligious discrimination.

Morever, the "essential" difference between religious and secular professions is *only visible to the theological eye*. That is, the nonbeliever considers religious acts to be meaningless rituals of no greater significance than a Zumba exercise. Only to the eyes of faith is the religious act "essentially" different. Yet the federal and state courts are not equipped or even permitted to render such inherently religious assessments. While disallowing a *special assessment* for ministers did not require courts to determine whether Ethical Culture or Veganism counts as a religion – nobody got tax money for their profession – a targeted exclusion of what is "essentially religious" from an otherwise general benefits program thrusts courts ineluctably into the theological thicket.

support for playground resurfacing is "essentially" support for child safety.

The distinction between special privileges and unique disabilities has growing importance in a time of expanding government. The more benefits and services the state undertakes to pay, deliver, control, or manage, the more important it becomes to resist discriminatory disqualifications. When the state undertakes, for example, to foot the bill for healthcare for the populace or a segment thereof, it is plainly discriminatory to disqualify otherwise eligible ministers, and only ministers, for this tax-funded benefit.

In short, the rationale of *Locke* rests upon a basic category error. Disavowing that error leaves *Locke* without its asserted historical foundation. But even if this Court were to leave *Locke entirely* intact, *Locke* would not control this case involving the wholly secular common benefit of child safety measures.

B. THE *LOCKE* DECISION WAS UNNECESSARY.

Compounding the weakness of the rationale in *Locke* is the fact that determination of the opinion's central issue was completely unnecessary to resolve the case. In actuality, the restriction at issue in *Locke* was so poorly tailored to the state's proffered rationale as to be irrational, having no real effect except to penalize those students who were guileless enough to declare a major in devotional theology before they were required to do so.

The scholarship at issue in *Locke*, the Promise Scholarship, was available to graduating high school students for use only in the first two years of college

study. Wash. Admin. Code §§ 250-80-010, 250-80-070(1), (4); *Locke*, 540 U.S. at 715-16. It could be used for any college "education-related expense, including room and board," 540 U.S. at 716. Students who did not declare any major during their first two years of college, or who declared a major other than devotional theology, could receive the Promise Scholarship. Brief for Respondent at 10 & n.4, *Locke v. Davey*, No. 02-1315 (U.S. Sept. 8, 2003) (citing record and noting that the state relied, in its answer, upon the ability of students to decline to announce a major and retain their eligibility for the scholarship). But any student who declared a major in devotional theology – i.e., theology taught from a believing perspective – was penalized with the loss of scholarship eligibility. 540 U.S. at 716.

Thus, the scholarship program at issue in *Locke*:

- Did not bar the use of tax funds for the study of devotional theology or ministerial training, even if the student fully intended to become a minister, so long as the student *did not declare a major*, *id.* at 725 & n.9;
- Did not bar the use of tax funds for the study of devotional theology or ministerial training as an elective or even a required course, even if the student fully intended to become a minister, so long as the student had *declared a different major*, *id.*;
- Did not bar the use of tax funds for the study of theology, even by an actual minister or minister in training, so long as the theology was taught from a nonbelieving perspective, *id.* at 716.

However, the restrictions at issue *did* disqualify a student with a declared major in devotional theology:

- Even if the student took no more courses in devotional theology than were required of all other students at the same school, *id.* at 725 & n.9;
- Even if the student subsequently changed his career plans and did not become clergy (like Joshua Davey himself, who attended Harvard Law School, *see* Joshua Davey, *The Real Losers of Locke v. Davey*, Harv. Icthus Online (Spring 2004), www.hcs.harvard.edu/~ichthus/issues/1.1/essay_davey.html and is now a partner at a private law firm, https://www.mcguirewoods.com/People/D/Joshua-D-Davey.aspx#overview).

Thus, the restriction at issue in *Locke*, which supposedly furthered the goal of avoiding tax funding "for vocational religious instruction," 540 U.S. at 725, was almost completely ineffectual. Scholarship recipients, including clergy in training, could use scholarship funds for devotional theology study so long as they had declared a different major or were savvy enough not to declare any major. Meanwhile, students like Joshua Davey were penalized for their voluntary declaration of a major that they were not even required subsequently to pursue. Ultimately, the haphazardly tailored restriction in *Locke* was no more than a penalty for a college freshman's forthrightness regarding his major, or a punishment for his mistaken predictions about his future study plans.

The *Locke* Court should have struck down the restrictions at issue as an irrational penalty on free speech (declaring a major) and religious exercise (declaring one's intent to pursue a religious vocation) that fails even minimal scrutiny. That case should certainly not be rewritten into the basis for a new, broad mandate to target religious entities for unique

identity-based discrimination in the context of wholly secular child safety measures.

CONCLUSION

May a government program of flood relief exclude houses of worship, and only houses of worship? May a municipality provide taxpayer-funded police, fire, and rescue to all other residents yet exclude only churches, synagogues, and mosques? *Cf. Everson*, 330 U.S. at 17-18 (describing such services as "indisputably marked off from the religious function" of church schools). May a state categorically exclude churches while otherwise allowing any entity that maintains a playground to apply for resurfacing aid, for the safety of children who play there? The answer in all such cases is a resounding "no."

This Court should reverse the judgment of the Eighth Circuit.

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SARAH PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, ACLU OF MISSOURI, AMERICAN HUMANIST ASSOCIATION, CENTER FOR INQUIRY, FREEDOM FROM RELIGION FOUNDATION, AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to defending the principles embodied in the U.S. Constitution and our nation's civil rights laws. The ACLU of Missouri is a state affiliate of the national ACLU and has more than 4,500 members. As an organization that, for nearly a century, has been dedicated to preserving religious liberty, including the right to be free from compelled support for religious institutions and activities, the ACLU has a strong interest in the proper resolution of this case.

The American Humanist Association (AHA) is a national nonprofit organization that advocates progressive values and equality for humanists, atheists, freethinkers, and other nontheists, and a society guided by reason, empathy, and our growing knowledge of the world. Founded in 1941 and headquartered in Washington, DC, its work is extended through 180 local chapters and affiliates across America, including Missouri. AHA promotes Humanism, a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. AHA objects to the use of taxpayer revenue to support

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[1] The parties have consented to the submission of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

religious activities, and joins in filing this amicus brief in order to help defend the constitutional requirement of separation of church and state.

The Center for Inquiry (CFI) is a nonprofit educational organization dedicated to promoting and defending reason, science, freedom of inquiry, and humanist values. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

The Freedom From Religion Foundation (FFRF), a national nonprofit organization based in Madison, Wisconsin, is the largest association of freethinkers in the United States, representing 24,000 atheists and agnostics. FFRF is a growing organization, with members in every state, including more than 300 in Missouri. FFRF's two primary purposes are to educate the public about nontheism and to defend the constitutional separation between state and church. This second purpose includes ensuring that citizens, including FFRF members, are not forced to violate their conscience by financing religion, which gives FFRF a strong interest in this case.

People For the American Way Foundation (PFAWF) is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now

has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principle that both the Free Exercise Clause and Establishment Clause of the First Amendment to the Constitution work to truly protect religious liberty for all Americans, and that the right to be free from compelled financial support for religious institutions and activities is a fundamental part of religious liberty, as our Founders recognized. PFAWF thus has a strong interest in the proper resolution of this case and accordingly joins this brief.

SUMMARY OF ARGUMENT

The question presented in this case is based on a fundamentally flawed assumption: that the government "has no valid Establishment Clause concern" respecting the direct payment of taxpayer dollars to a church. Pet. at i. The Court of Appeals, while correctly holding that Missouri was well within its constitutional authority to decline public funding of a church based on state-law protections, made the same erroneous assumption as Petitioner. In dicta, the court suggested that Missouri could have provided the funding at issue without violating the Establishment Clause.

In fact, the government's provision of direct cash aid to a house of worship raises constitutional concerns of the highest order. Missouri could not have included Trinity Lutheran Church in the grant program without violating the First Amendment because the Establishment Clause squarely prohibits the direct payment of taxpayer funds to churches and other houses

of worship. In short, Missouri's decision to exclude Trinity Lutheran Church from the program was not merely permissible; as a constitutional matter, it was required.

The use of taxpayer dollars to aid churches was one of the Framers' greatest concerns and, in large part, animated the passage of the Establishment Clause. James Madison and Thomas Jefferson recognized that compelling taxpayers to provide direct financial support to houses of worship encroaches on the right of conscience and threatens our freedom to decide for ourselves which faith to practice and support, or whether to follow any faith at all. In our increasingly pluralistic nation, where the number of nontheists and minority-faith adherents is growing rapidly, depositing taxpayer dollars into churches' coffers also advances religion in a way that is likely to engender the very sort of religious divisiveness and church-state interdependence the Framers sought to avoid.

Speaking to the Framers' fears, in case after case this Court has affirmed that providing direct government aid to religious institutions, even as part of a general program, raises grave Establishment Clause concerns. To be sure, the Court has, in some cases, upheld government aid to certain non-church religiously affiliated institutions, such as elementary and secondary schools, colleges, and universities. Those circumstances, though, have been limited, and the Court was always assured that the aid would not be used for religious activities or later diverted to religious purposes. *But never for a church.*

Churches and houses of worship are the quintessential religious institutions. By tradition and design, they play a unique and central role in many faiths. As a practical, spiritual, and symbolic matter, they are often the lifeblood and focal point of the religious community. The many Establishment Clause concerns that this Court has identified with respect to the direct funding of non-church religiously affiliated institutions, such as schools, apply with even greater force when it comes to houses of worship. These concerns cannot be surmounted, even with extensive monitoring and other safeguards that the Court has authorized for direct government aid provided to other types of religious institutions.

This Court's Establishment Clause jurisprudence has few bright-line rules, but in this instance, the Court should reiterate that our historical aversion to direct taxpayer funding of houses of worship is one line that may not be crossed, no matter how well-meaning the government program may be. Strict enforcement of this constitutional boundary is essential to maintaining the delicate balance that the Framers sought to create in singling out religion for special protection.

Even should the Court decline, however, to conclude that direct taxpayer funding of a house of worship is always prohibited, at a minimum, *amici* urge the Court to clarify that the proposed funding in this case would nevertheless violate the Establishment Clause. This Court has never authorized direct taxpayer funding of a religious institution without adequate safeguards to prevent its misuse for sectarian ends. Trinity Lutheran Church refused to certify that it would not use the

playground supported by taxpayer dollars for religious purposes, such as a gathering space in which the church directs children in prayer or other religious instruction. And the state program includes no monitoring requirements or other precautions to protect against such impermissible religious uses of the playground. This is more than sufficient to render the grant unconstitutional.

ARGUMENT

I. The Establishment Clause Prohibits The State From Awarding Direct Grants Of Taxpayer Funds To Houses Of Worship.

Petitioner asks this Court to issue an unprecedented ruling that would *require* the government to provide direct cash subsidies to a church. The Court should decline to adopt this proposed constitutional rule. The State is correct in arguing that it violated none of Trinity Lutheran Church's rights in declining to include the Church in its Playground Scrap Tire Surface Material Grant Program ("Scrap Tire Program"),[2] and this Court can affirm on that basis alone. But as the history of the First Amendment and this Court's precedents

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[2] Under the Scrap Tire Program, which is administered by the Missouri Department of Natural Resources, "public school districts, private schools (depending on status), park districts, nonprofit day care centers, other nonprofit entities and governmental organizations other than state agencies" are eligible to apply for grants to resurface their playgrounds using scrap tires. Missouri Department of Natural Resources, Playground Scrap Tire Surface Material Grant Application Instructions for Form 780-2143 (Dec. 2014), http://dnr.mo.gov/pubs/pub2425.htm (last visited June 30, 2016).

demonstrate, Missouri's funding decision was not only permissible, but constitutionally commanded. Requiring Missouri to dispense taxpayer dollars to a church would contravene the fundamental principles underlying the First Amendment and gut one of its core religious-liberty protections.

A. The Establishment Clause Reflects The Framers' Profound Concern Over Taxpayer Funding Of Churches.

1. *The Framers opposed taxpayer support of houses of worship and other religious institutions, even as part of a general, nondiscriminatory program.*

In drafting and adopting the Establishment Clause, the Framers, including Madison (the principal architect of the First Amendment) and Jefferson, were reacting to what they viewed as the unconscionable treatment of religious dissenters and minorities throughout the colonies. Religious minorities and nontheists were imprisoned and persecuted for their purported heresy, and they were "compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters." *Everson v. Bd. of Educ.*, 330 U.S. 1, 10 (1947) (footnote omitted). In fact, at the time, "[a]lmost every colony exacted some kind of tax for church support." *Id.* at 10 n.8.

It was against this historical backdrop that Madison drafted his famous "Memorial and Remonstrance

Against Religious Assessments," opposing Virginia's "Bill establishing a provision for Teachers of the Christian Religion." Under the original text of the bill, each taxpayer could direct his taxes to support religious education carried out by the particular sect he favored; it was later amended so that taxpayers could also refuse to designate a religious society as the recipient of the tax, and the funds would default to the Legislature to be appropriated to both religious and non-religious education. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 869 n.1 (1995) (Souter, J., dissenting) ("The assessment had been carefully drafted to permit those who preferred to support education rather than religion to do so." (quoting T. Buckley, *Church and State in Revolutionary Virginia*, 1776–1787, p. 133 (1977))); *see also Everson*, 330 U.S. at 36-37 (Rutledge, J., dissenting). However, "[t]he fact that the bill, if passed, would have funded secular as well as religious instruction did nothing to soften Madison's opposition to it." *Rosenberger*, 515 U.S. at 869 n.1 (Souter, J., dissenting). *Accord Everson*, 330 U.S. at 37 (Rutledge, J., dissenting) ("Madison was unyielding at all times, opposing with all his vigor the general and nondiscriminatory as he had the earlier particular and discriminatory assessments proposed.").

Whether government assistance to religion occurred in connection with a preferential scheme, or a general, nondiscriminatory program, Madison was adamant that even "three pence" in aid was too much of a threat to religious liberty. *Id.* at 40 (citing Memorial and Remonstrance ¶ 3); *see also, e.g.*, Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim*

About Original Intent, 27 Wm. & Mary L. Rev. 875, 921, 923 (1986) (The Framers "did not substitute nonpreferential taxes for preferential taxes; they rejected all taxes. . . . The principle was what mattered. With respect to money, religion was to be wholly voluntary. Churches either would support themselves or they would not, but the government would neither help nor interfere."); *Flast v. Cohen*, 392 U.S. 83, 103-04 (1968) ("The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general.").

While the Virginia bill promoting taxpayer support for religious education languished in the wake of Madison's famous protest, another bill—rooted in the same religious freedom ideals espoused by Madison—flourished. Drafted by Thomas Jefferson and passed in 1786, the "Virginia Bill for Religious Liberty" declared that "compel[ling] a man to furnish contributions of money for the propagation of opinions[,] which he disbelieves[,] is sinful and tyrannical," and provided, as a remedy to this evil, "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." *Everson*, 330 U.S. at 12-13 (internal quotation marks omitted).

Through the Memorial and Remonstrance and the Virginia Bill for Religious Freedom, Madison and Jefferson gave voice to many who objected to the abusive treatment of religious minorities and dissenters.

> These practices became so commonplace as to shock the freedom-loving colonials into a feeling

> of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment.

Id. at 11 (footnotes omitted).

2. The Establishment Clause was intended, in part, to protect religious freedom from the specific threats associated with taxpayer funding of religious institutions.

The non-establishment principle embraced by the Framers was not incorporated into the First Amendment out of hostility toward religion. Rather, it reflected the Framers' understanding that religious freedom, and religion in general, would be endangered in demonstrable ways if the government's influence over, and involvement in, matters of faith were not severely restricted.

When the government's support for religion takes the form of direct taxpayer aid, the threat to religious liberty is especially high. As the Framers recognized, the historical practice of compelling individuals to financially support religion was a direct assault on the fundamental human right of freedom of conscience. *See supra* Part I(A)(1); *see also* Noah Feldman, *Divided By God: America's Church–State Problem—And What We Should Do About It* 48 (2005) ("The advocates of a constitutional ban on establishment were concerned about paying taxes to support religious purposes that their consciences told them not to support."); Jesse Choper, *Securing Religious Liberty* 16 (1995) ("There is

broad consensus that a central threat to the religious freedom of individuals and groups—indeed, in the judgment of many, the most serious infringement upon religious liberty—is posed by forcing them to pay taxes in support of a religious establishment or religious activities." (internal quotation marks omitted)).

In the Framers' view, the decision whether to adhere to or support a particular faith, or none at all, is one that every person has a right to make without the slightest coercion, and taxpayer funding of religious institutions violates that ideal. *See, e.g.*, *Everson*, 330 U.S. at 65-66 (Memorial and Remonstrance ¶ 3: "Who does not see that . . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"). Not surprisingly, then, "[i]n no phase was [Madison] more unrelentingly absolute than in opposing state support or aid by taxation." *Id.* at 40 (Rutledge, J., dissenting). And, while the Framers' concerns for freedom of conscience are applicable to all religiously affiliated institutions, they are substantially heightened and pronounced when the aid is given to houses of worship, as argued below. *See infra* Part I(B).

The Framers also worried that "a union of government and religion tends to destroy government and to degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Madison lamented that the government's financial support for religion weakens support for religion and undermines its "purity and efficacy." *Everson*, 330 U.S. at 67 (Memorial and Remonstrance ¶ 7).

Tying houses of worship financially to the State also undermines religious freedom by inviting the government to scrutinize and oversee their operations. *See Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971) ("The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance."). Despite any short-term gain for the government-funded religious institution, in the long run, religious liberty is eroded, and, in the case of direct aid to a church, church autonomy is impeded. *See Flast*, 392 U.S. at 103-04; *Everson*, 330 U.S. at 27-28 (Jackson, J., dissenting) ("Many groups have sought aid from tax funds only to find that it carried political controls with it. Indeed this Court has declared that 'It is hardly lack of due process for the Government to regulate that which it subsidizes.'" (quoting *Wickard v. Filburn*, 317 U.S. 111, 131 (1942))); *cf. infra* Part I(B) (noting First Amendment problems when government interferes with church autonomy).

Finally, taxpayer support for religious institutions gives rise to divisiveness along religious lines—"one of the principal evils against which the First Amendment was intended to protect." *Lemon*, 403 U.S. at 622; *see also, e.g., Everson*, 330 U.S. at 69 (Memorial and Remonstrance ¶ 11: "[I]t will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects."). It provokes religious strife by branding, as second-class citizens, those who object, for reasons of conscience, to aiding a particular sect or religion generally. *See, e.g., Everson*, 330 U.S. at 69 (Memorial

and Remonstrance ¶ 9: "It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.").

Further, it pits faith against faith, sect against sect, by creating competition and conflict among denominations and religions as they fight for an ever-larger share of the government's largesse. *See id.* at 53-54 (Rutledge, J., dissenting). This type of religiously based discord threatens the political process and, ultimately, our democracy. *See Lemon*, 403 U.S. at 622-23; *Everson*, 330 U.S. at 54 (Rutledge, J., dissenting) ("The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions.").

B. The Establishment Clause Bars Missouri From Providing A Direct Grant Of Taxpayer Dollars To Trinity Lutheran Church.

This Court, under very limited circumstances, has authorized direct cash aid for some religiously affiliated institutions, as discussed below. *See infra* Part II(A). *But it has never authorized direct cash aid for a church or house of worship.* In light of our constitutional history, this type of aid strikes at the core of the Establishment Clause. Although the Court need not reach this issue to determine that Missouri's denial of aid was proper, *amici* urge the Court to reaffirm that, under the First Amendment, the government may not provide taxpayer dollars directly to churches and other houses of worship.

In *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970), the Court upheld tax exemptions for churches in the face of an Establishment Clause challenge. The Court's ruling hinged on the "unbroken practice of according the exemption to churches" that spanned "our entire national existence and indeed predates it," as well as the fact that "the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.* at 675, 678. But the Court warned of the dangers of direct taxpayer grants for churches:

> Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches; each relationship carries some involvement rather than the desired insulation and separation.

Id. at 675 (footnote omitted).

Twenty-five years later in *Rosenberger*, the Court again acknowledged that the government's award of cash aid for churches would violate the Establishment Clause: "It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse." 515 U.S. at 844. *Cf. Flast*, 392 U.S. at 98 n.17 (characterizing Congress's hypothetical provision of funds for "the construction of churches for particular sects" as "palpably unconstitutional").

The Court's wariness is well founded. Houses of worship are uniquely situated religious institutions. While faith-based nonprofits and religiously affiliated schools may play some role in the religious community, houses of worship are the lifeblood of many faith systems; they stand at the heart of organized religion. Churches occupy vital and central roles in Christianity, as do mosques in Islam, temples in Hinduism, synagogues in Judaism, gurdwaras in Sikhism, and so on. Symbolically, these houses of worship are inextricably intertwined with the faiths they represent in a manner that is just not true of other religious institutions.

For these reasons, our laws frequently distinguish between houses of worship and other religiously affiliated institutions and organizations in different contexts. For example, Section 501(c)(3) of the Internal Revenue Code differentiates between houses of worship and other nonprofits, religiously affiliated or otherwise. Relying on this distinction, many provisions of the tax code provide exemptions to houses of worship that are not afforded to other religiously affiliated entities. Although tax-exempt organizations are generally required to file a Form 990 (Return of Organization Exempt From Income Tax), for instance, churches are not. 26 U.S.C. § 6033(a)(3)(A)(i). Churches also are exempt from registering with the IRS as nonprofit organizations. 26 U.S.C. §§ 501(c)(1)(A), 501(c)(3). The Lobbying Disclosure Act does not apply to churches. 2 U.S.C. § 1602(8)(B)(xviii). And churches enjoy enhanced protection against audits. 26 U.S.C. § 7611. Similarly, "in order to prevent excessive government entanglement with religion," the Employee Retirement

Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., exempts from its requirements employee benefit plans offered by houses of worship but not identical plans offered by church-related or religiously affiliated institutions or organizations. *See, e.g., Stapleton v. Advocate Health Care Network*, 817 F.3d 517, 519 (7th Cir. 2016).

The lower courts have enforced these distinctions, which provide houses of worship—in light of their special stature in faith systems—with breathing room to carry out their unique religious functions. *See, e.g., id.* (holding that church-affiliated health-care system did not qualify for ERISA church plan exemption); *see also Kaplan v. Saint Peter's Healthcare System*, 810 F.3d 175, 186 (3d Cir. 2015) (applying same reasoning to religiously affiliated hospital); *Spiritual Outreach Soc'y v. Commissioner*, 927 F.2d 335, 339 (8th Cir. 1991) (upholding IRS determination that a gospel-music organization was not a church and did not qualify for church exemptions).

The Establishment Clause's prohibition of direct government aid to churches is, necessarily, part and parcel of the special status we afford to houses of worship. *See Everson*, 330 U.S. at 40 (Rutledge, J., dissenting) ("'Establishment' and 'free exercise' were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom."). As a result of the unique and pivotal place that houses of worship hold across different faith systems, the government's delivery of direct cash aid to them implicates Establishment Clause concerns of the highest order—even more directly and powerfully than

the concerns associated with providing such aid to non-church religiously affiliated institutions. These concerns cannot be overcome by any measure of safeguards. On the contrary, such government intrusion into the operation of a church would, with great likelihood, itself violate the First Amendment. *See Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (noting that the Constitution guarantees churches "an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"); *see also Lemon*, 403 U.S. at 620-22.

Accordingly, Missouri was not only permitted to deny funding to Trinity Lutheran Church; it was constitutionally mandated to do so. In contrast to non-church religiously affiliated institutions that have sought aid in previous cases before this Court, Trinity Lutheran is a house of worship.

Although the Church purports to lay claim to this subsidy for the preschool and day care center it operates on church premises, they are one and the same: The preschool and day care merged into the church in 1985. Pet. App. 2a. And, ultimately, it is the church that seeks taxpayer dollars to improve church facilities (in this case a playground), which will benefit not only the preschool and day care center but the church as a whole.

The aid sought by Petitioner is thus of an entirely different character than generally available services provided to houses of worship by police and fire departments. *See Everson*, 330 U.S. at 60-61 & n.56 (Rutledge, J., dissenting). And it goes far beyond the

indirect, tax-exempt aid that this Court upheld for churches in *Walz*: Here, the State would be "transfer[ring] part of its revenue" into the coffers of a house of worship. *Cf. Walz*, 397 U.S. at 675; *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) ("[O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." (internal citations omitted)); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10, 12–13 (1993) (upholding provision of government-paid sign-language interpreter for deaf student at religious school because "no funds traceable to the government ever find their way into sectarian schools' coffers" and the interpreter would "be present in a sectarian school only as a result of the private decision of individual parents"); *Everson*, 330 U.S. at 18 ("The State contributes no money to the schools. It does not support them.").[3] In short, no matter how well-meaning the grant program may be, the funding proposed by Petitioner cannot be reconciled with our constitutional

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[3] That the grants are distributed as part of a general program does not render them constitutional when directed to a church or house of worship. The Framers resisted such funding, *see supra* Part I(A)(1), and the Court has "never held that a government-aid program passes constitutional muster solely because of the neutral criteria it employs as a basis for distributing aid." *Mitchell v. Helms*, 530 U.S. 793, 839 (2000) (O'Connor, J., controlling concurrence). Moreover, the discretionary nature of the Scrap Tire Program, *see* Resp. Br. at 22-23 (citing Pet. App. 120a-154a), compounds the Establishment Clause dangers here.

history or this Court's precedents. It must be prohibited under the Establishment Clause.

II. At A Minimum, Missouri Cannot Give Trinity Lutheran Church A Direct Cash Grant Without Including And Enforcing Appropriate Safeguards Against Religious Use Of Taxpayer Funds.

Even if churches could receive public aid in some circumstances, the Court should affirm that the direct grant of taxpayer dollars at issue here is not permissible. The Establishment Clause prohibits the government from paying for religious facilities if they will be used for religious purposes. Here, Trinity Lutheran Church insists that the State abandon its obligation to enforce this constitutional rule. It claims a right to taxpayer funds, but will not—and indeed cannot—agree to follow any restrictions ensuring it will not use its playground, once improved at taxpayer expense, to advance the Church's religious mission. In fact, the limited record before the Court indicates that the Church will do just that.

A. Even For Non-Church Religious Institutions, This Court Has Required Concrete Limitations On Direct Taxpayer Aid.

This Court has never allowed direct cash aid, even for non-church religious institutions, without adequate safeguards against misuse for religious purposes and activities. And for good reason: This form of state aid for religious institutions "falls precariously close to the original object of the Establishment Clause's prohibition." *Mitchell v. Helms*, 530 U.S. 793, 856 (2000)

(O'Connor, J., controlling concurrence). Thus, in its rulings severely limiting such aid, the Court has continually highlighted the "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." *Rosenberger*, 515 U.S. at 842.

In *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 763-64 (1973), for example, the Court struck down a law that would have provided direct cash aid to private elementary and secondary schools, including religious schools, serving large numbers of low-income students. The aid was to be used for a worthy cause—the "maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils." *Id.* at 762 (internal quotation marks omitted); *see also id.* at 763 (noting the legislature's findings that a "fiscal crisis in nonpublic education . . . has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children in low income urban areas" (internal quotation marks omitted)). The Court did not "question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its schoolchildren," *id.* at 773, but the grant program still could not pass muster under the Establishment Clause because it failed to protect against the use of the aid for religious purposes:

> No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these

> religion-oriented institutions to impose such restrictions. Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities. Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools.

Id. at 774.

Nyquist followed the precedent set in *Tilton v. Richardson*, 403 U.S. 672, 689 (1971), in which the Court upheld a direct grant program for colleges and universities, including religiously affiliated ones, to assist in the construction of academic facilities. There, unlike in *Nyquist*, the law was "carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions." *Id.* at 679. First, the statute expressly limited the use of the program's grants and loans for the construction of academic facilities that would "be used for defined secular purposes and expressly prohibit[ed] their use for religious instruction, training, or worship." *Id.* at 679-80. Second, the government retained a twenty-year interest in the buildings constructed with grant funds and was authorized to monitor compliance with the religious-use rule through on-site inspections. *Id.* at 675. Third,

colleges and universities that violated this restriction were required to pay back funds. *Id.* at 680.

These safeguards, the Court ruled, were generally adequate to obviate any Establishment Clause concerns, especially given the Court's understanding that "religious indoctrination [was] not a substantial purpose or activity of the [participating] church-related colleges and universities." *See id* at 687.[4]

However, in *Tilton* the Court did take issue with one important aspect of the direct-grant program: the

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[4] The other instances in which the Court has upheld direct taxpayer funding for religiously affiliated organizations all included similar safeguards. *See, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 614–15 (1988) (upholding direct aid provided to faith-based organizations as part of a general grant program for teen counseling on sexuality where statute set forth a detailed "mechanism whereby the Secretary can police the grants that are given out under the Act to ensure that federal funds are not used for impermissible purposes," and remanding to district court for determination as to whether any religious organizations had improperly used aid to further their religious beliefs); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 741-42 (1976) (affirming constitutionality of direct, noncategorical grants for colleges and universities, including religiously affiliated schools, where law excluded institutions awarding primarily theological degrees, expressly prohibited any sectarian use of aid, and set forth numerous administrative requirements and documentation to ensure compliance with sectarian-use prohibition); *Bradfield v. Roberts*, 175 U.S. 291, 298-300 (1899) (allowing direct government aid to a religiously affiliated hospital where the hospital's corporate charter limited its purpose and services to the secular realm); *cf. Hunt v. McNair*, 413 U.S. 734, 739-40, 744 (1973) (upholding bond-financing program for colleges because statute forbade facilities constructed with bond-related funds from being "used for religious purposes," and authorized inspections to enforce prohibition).

expiration of the prohibition on religious use after twenty years, which would have "open[ed] the facility to use for any purpose at the end of that period." *Tilton*, 403 U.S. at 683. In that regard, the Court held that the program failed to satisfy the Establishment Clause because "the unrestricted use of a valuable property is in effect a contribution of some value to a religious body." *Id.* (explaining that if the building were converted to a chapel or "otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion").

Similarly, in *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472, 479-80 (1973), the Court affirmed a permanent injunction barring direct money grants for religious schools to provide, among other services, the administration, grading, and reporting of certain examination results. Noting that "no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction," the Court held that the grants ran afoul of the Establishment Clause because "the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities." *Id.* at 480. The Court reaffirmed that "the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination." *Id. But see Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 659 (1980) (upholding subsequent version of the *Levitt* program after statute was amended to provide "effective means for insuring that the cash reimbursements would cover only secular services" and

"ample safeguards against excessive or misdirected reimbursement").

On at least one occasion, this Court has held that, despite numerous safeguards to protect against religious uses, a direct cash aid program was nevertheless unconstitutional. In *Lemon*, the Court invalidated a Pennsylvania law that directly reimbursed private elementary and secondary schools, including religious schools, for expenses relating to teachers' salaries, textbooks, and instructional materials. 403 U.S. at 609, 620-25. The measure was passed after the Legislature determined that rising costs in the State's private schools had caused a "crisis." *Id.* at 609. Under the statute, the reimbursement aid was restricted to "courses presented in the curricula of the public schools"—specifically, "solely" secular subjects such as mathematics, foreign languages, physical science, and physical education. *Id.* at 610 (internal quotation marks omitted). Moreover, the use of the aid in connection with "any subject matter expressing religious teaching, or the morals or forms of worship of any sect" was explicitly prohibited, and the State Superintendent of Public Instruction was required to approve all textbook and instructional materials financed by the program. *Id.* (internal quotation marks omitted). In addition, participating schools were required to adopt "prescribed accounting procedures that identify the separate cost of the secular educational service," and those accounts were open to audit by the state. *Id.* (internal quotation marks omitted).

These extensive safeguards, however, were not a panacea. Quite the opposite—the "very restrictions and

surveillance necessary to ensure that teachers play[ed] a strictly non-ideological role" engendered their own troubling result: unconstitutional entanglement between religion and government. *Id.* at 620-21.[5]

B. The Church Cannot Receive A Direct Grant Of Taxpayer Funds Without Adequate Safeguards.

Trinity Lutheran has made it clear that it will not (and cannot) provide the certifications that Missouri requires for participation in the Scrap Tire Program: that it is "not owned or controlled by a church," that its "mission and activities are secular," and that the grant will be used for non-religious purposes. Pet. App. 128a-129a (ECF No. 36-3). Absent those certifications, there is simply no way to ensure that any grant that Trinity Lutheran receives will not be used to promote religion in violation of the Establishment Clause. That alone is sufficient to uphold the decision below.

But, even if the Church could and did provide the certifications that Missouri requires, it would be insufficient to protect the constitutional interests at stake because there is no way for the State to enforce these restrictions. Unlike the funding programs upheld in *Tilton* and *Roemer*, for example, the State is not

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[5] The Court's long-standing commitment to ensuring that direct aid to religious institutions is not used for religious purposes extends as well to in-kind—as opposed to direct cash—aid. *See, e.g.*, *Mitchell*, 530 U.S. at 840-41, 848-49 (O' Connor, J., controlling concurrence) (detailing numerous safeguards put in place to ensure that government's direct, in-kind loans of materials and equipment to public schools were not diverted to religious uses).

authorized under the Scrap Tire Program to conduct inspections, or otherwise monitor the playground facilities to ensure that they are restricted to non-religious uses. *See generally* Mo. Rev. Stat. §§260.335, 260.273.6(2); Mo. Code Regs. tit. 10 § 80-9.030. Likewise, there appears to be no mechanism for the State to recover all or part of a grant should a recipient use the playground for impermissible sectarian activities.

Trinity Lutheran argues that, if awarded to the Church, the grant at issue here would be "wholly secular." Pet. Br. at 39. Not so. The limited record before the Court shows a significant risk that the Church will use its taxpayer-improved playground for religious activities. Trinity Lutheran Church integrates religious teaching into all aspects of the preschool and is, therefore, likely to use its taxpayer-financed playground for religiously oriented activities. As the Church readily acknowledges in its Complaint, "[t]he Learning Center is a ministry of the Church and incorporates daily religion and developmentally appropriate activities into a school and optional daycare program. Through the Learning Center, the Church teaches a Christian world view to children of members of the Church, as well as children of non-member residents of Boone County and the surrounding area." The Learning Center's educational program is structured to allow a child to grow spiritually, physically, socially, and cognitively and the Church uses the Learning Center "to teach the Gospel to children of its members, as well to bring the Gospel message to non-members." Pet. App. 101a ¶¶ 14-18.

The preschool's parent handbook, moreover, explains that its "daily morning schedule consists of Jesus Time/chapel, music, small group time, learning centers, gym and playground time." It further describes its curriculum as being "Christ-centered in its approach to teaching developmental and academic readiness skills, concepts, and values. Prayer is an integral part of each day, as are daily 'Jesus Time' classes and weekly chapel times with the pastors. The members of the staff are committed to providing an atmosphere of personal warmth and support which stems from a love of our Lord and a love for the children." Trinity Lutheran Child Learning Center, Parent Handbook, https://tlclckids.com/enroll/parent-handbook/ (last visited June 30, 2016).

In addition, without an enforcement mechanism, the Church could use its playground, improved at taxpayer expense, for similar religious purposes in connection with the church's Vacation Bible School, Sunday School, or any other youth-oriented church event that involves religious instruction or indoctrination. *See* Trinity Lutheran Church, Child Ministries, http://www.trinity-lcms.org/child (last visited June 30, 2016).

Because the record shows that Trinity Lutheran Church would likely engage in religious instruction, prayer, or other forms of religious activity on its taxpayer-improved playground, and because the Missouri Scrap Tire Program lacks adequate safeguards against this misuse of government aid, Petitioner's proposed grant would run afoul of the Establishment Clause.

CONCLUSION

The suggestion by Petitioner and the Court of Appeals that providing direct cash aid to a church raises no valid Establishment Clause concerns is belied by our constitutional history and this Court's precedents. The judgment of the Eighth Circuit should be affirmed for the reasons presented herein.

Respectfully submitted,

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July 5, 2016

RECORD AND BRIEF

No. 15-577

IN THE

Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,

Petitioner,

v.

SARAH PARKER PAULEY, DIRECTOR,
MISSOURI DEPARTMENT OF NATURAL RESOURCES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN JEWISH COMMITTEE IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

The American Jewish Committee ("AJC") is a national organization with more than 125,000 members and supporters and 22 regional offices nationwide. It was founded in 1906 to protect the civil and religious rights of American Jews. Its core mission is to enhance the well-being of the Jewish people through the advancement of human rights and democratic values.

AJC believes that the First Amendment's twin guarantees of the free exercise of religion and the separation of church and state work together to ensure that Americans of all faiths and of no faith can live as their consciences dictate. Respecting these constitutional mandates is also the surest way of avoiding entrenched religious divisions in our pluralistic society.

While there is a long and honorable history of taxpayer funds being used to support faith-based institutions in their provision of secular social services, any such funding must be accompanied, in AJC's view, by adequate church-state safeguards. Among other things, this means that public grants or contracts should not be used to fund "pervasively religious organizations" whose religious mission is inextricably intertwined with the provision of services.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amicus curiae* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner's blanket consent to the filing of *amicus* briefs is on file with the Clerk. Respondent has consented to the filing of this brief.

Nevertheless, when these concerns are not present—that is, where the program or activity at issue is inherently secular in nature and would be perceived by the public as such—AJC believes that religious organizations should be entitled, as a matter of federal constitutional law, to apply for government funding on the same terms as secular organizations.

SUMMARY OF THE ARGUMENT

The "room . . . between the two Religion Clauses," as the Court described it in *Locke v. Davey*, 540 U.S. 712, 725 (2004), sometimes permits a state to give its own anti-establishment interests greater weight than the minimum required by the federal Establishment Clause. But, as *Locke* emphasized, this principle is at other times limited by the Free Exercise Clause, among other provisions of the Federal Constitution. *See id.* at 718; *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

As in *Widmar*, the Court need not decide exactly how far Missouri may go in enforcing the stringent anti-establishment provisions of its constitution. *See Widmar*, 454 U.S. at 275-76. It is enough to recognize that the funding offered by Missouri for rubberized playground surfaces, even if it were to benefit a church-owned playground, could not reasonably be understood by the public as promoting a religious purpose, subsidizing the operational expenses of a house of worship, or otherwise involving the State in a matter outside the secular sphere.

As a result, the only potential anti-establishment concern in the context of this case is that a church, rather than some other organization, has applied for funding from the State. Denial of a religious organization's grant application solely because it is a

religious organization—not because the funding would advance or might appear to advance the organization's religious mission—promotes no valid anti-establishment policy or principle. Rather, it disadvantages the organization solely because it is a religious organization. The Free Exercise Clause does not permit that result.

In its very earliest case on the Establishment Clause, *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 15-18 (1947), the Court recognized the tension involved when the government provides public funds and services to or for the benefit of religious organizations. *See also Mitchell v. Helms*, 530 U.S. 793, 868, 874-75 (2000) (Souter, J., dissenting). But the grant program at issue here is thoroughly secular, and thus this case falls squarely on the Free Exercise side of the line.

ARGUMENT

I. DISQUALIFICATION OF AN APPLICANT FROM A STATE GRANT PROGRAM THAT FUNDS A FACIALLY NON-RELIGIOUS FUNCTION OR ACTIVITY, SOLELY BECAUSE THE APPLICANT IS A CHURCH, IS NOT PERMISSIBLE.

The only stated reason why Trinity Lutheran was denied funding for its playground—and apparently, the only reason in fact—is that its playground is owned by a church. All parties agree that the federal Establishment Clause would not be violated by funding this playground. Where a fundamentally religious function or program is involved, it may be permissible for the government to discriminate on the basis that the recipient of funding is a religious group, even absent a full-blown Establishment Clause

violation. But in this case, both the State's program and the church's proposed use of the funding are far removed from the realm of religious practice. The State's anti-establishment inclinations must yield to the church's right to equal participation in public life, and to receive public funding on equal footing with secular institutions.

A. Religious Organizations Provide Significant Benefits to the Public, Often Supplementing or Replacing Governmental Activities.

As this Court has recognized, there exists a "long history of cooperation and interdependency between governments and charitable or religious organizations." *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988). This tradition reflects the vital role that religious organizations play within the social-services sphere.[2] Indeed, Congress has acknowledged religious groups' unique capacity to address "problem[s] that [have] complex and moral and social dimensions"[3] that government agencies would be hard-pressed to confront on their own. The notion that "nonprofit

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[2] More than half of all congregations and many other religious organizations within the United States deliver human services to their communities. U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *Faith-Based Organizations In Community Development*, at i (2001), *available at* www.huduser.gov/portal/publications/faithbased.pdf [hereinafter *Faith-Based Organizations*].

[3] S. Rep. No. 97-161, at 15-16 (1981). This report relates to Adolescent Family Life Act programs, which dealt with problems of adolescent pregnancy through the partial involvement of religious organizations. The committee stated that "promoting the involvement of religious organizations in the solution to these problems is neither inappropriate nor illegal."

religious organizations have a role to play in the provision of services"[4] is a recognition that these organizations have become an integral part of the social safety net[5] and perform services that the government might otherwise provide.[6] *See Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 697 (1970) (Harlan, J., concurring) (recognizing religious groups' "doing of 'good works' by performing certain social services in the community that might otherwise have to be assumed by government").

Religious organizations provide a wide range of services that reflect their diverse natures. Examples include refugee resettlement,[7] adoption and foster

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[4] *Id.*

[5] Nearly 430,000 religious congregations exist within the United States, "represent[ing] over 20 percent of all identifiable nonprofit organizations in the country, and over one-quarter of the public-serving, or charitable, type of organizations." Lester M. Salamon, *America's Nonprofit Sector: A Primer*, 231–32 (3d ed. 2012).

[6] In fiscal 2006, 65 federally funded social-service programs were terminated, and an additional 63 saw their funding reduced. Part of the justification for the reduction in funding was that religious organizations would fill the gap in service. Kenneth Scott Smith & Martell Teasley, *Social Work Research on Faith-Based Programs: A Movement Towards Evidence-Based Practice*, 28 J. of Religion & Spirituality in Social Work: Social Thought 306, 307 (2009).

[7] From 2008 to 2013, more than 60,000 ethnic Nepalese refugees were resettled within the United States by several religious groups, including "the Hebrew Immigrant Aid Society, United States Conference of Catholic Bishops, Church World Service, World Relief, Lutheran Immigration and Refugee Service, and Episcopal Migration Ministries." The Aspen Institute, *Principled Pluralism: Report of the Inclusive America Project*, 33 (2013), *available at* www.aspeninstitute.org/sites/default/files/content/docs/jsp/Principled-Pluralism.pdf.

care,[8] homelessness,[9] activity centers for children,[10] and the construction of housing for low-income families.[11] This is true in Missouri as well as in the rest of the country.

B. A State's Anti-Establishment Interests, Though Generally Valid and Worthy of Respect, Must Yield When the State Provides Grants for an Apparently Secular Purpose.

This case presents an as-applied challenge to Trinity Lutheran's exclusion from Missouri's tire-grant program. The church does not seek to invalidate Missouri's anti-establishment constitutional provision in its entirety, nor is it necessary for the Court to determine the precise boundaries of the State's right to rely on its anti-establishment interests, extending beyond the requirements of the federal Establishment Clause, in the operation of its programs. The question, rather, is whether a state's otherwise valid anti-establishment policies may be given the weight that Missouri has given them here—*i.e.*, relying on them to deny funding for a project that does not itself present any First Amendment concerns, and thus to

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[8] Catholic Charities of the Archdiocese of St. Louis runs a foster-care home within the greater St. Louis area. *See* www.ccstl.org.

[9] Watered Gardens is a Christian community homeless shelter run in Joplin, Missouri. *See* www.wateredgardens.org.

[10] A group of Baptist fellowships formed a partnership in East St. Louis to create an activity center for children. *See* www.cacesl.org.

[11] Habitat for Humanity, a well-known and large international organization, is a Christian housing ministry, addressing the issues of poverty housing throughout the world. *See Faith-Based Organizations* at 11-12.

disadvantage religious institutions for no reason other than the fact that they are religious.

1. The government may decline to provide funding to religious organizations for religious purposes or otherwise to become excessively entangled with religious practices.

Many of the Court's religion cases have involved situations in which federal, state, or local governments have chosen to provide public funding that benefits religious schools and organizations or their constituents. *See, e.g., Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (vocational funding for student attending Bible college); *Agostini v. Felton*, 521 U.S. 203 (1997) (public-school teachers providing remedial education in parochial schools); *Mitchell* (federal funding for educational materials and equipment in sectarian schools); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (vouchers that may be used at religious schools).

Missouri's constitution includes a provision that, at a general level, diverges from the orientation of the governments involved in the cases discussed just above. The framers of the State's constitution expressed a strong desire that the State not provide public funding to churches and other religious institutions. This anti-establishment orientation, imposing special restrictions on aid to religious institutions beyond those applicable to comparable secular institutions, is not inherently illegitimate. As the Court held in *Locke*, there are circumstances in which a state may elect not to provide funding even though the federal Establishment Cause presents no obstacle. *Compare Witters*, 474 U.S. at 489 (holding that Establishment Clause does not prohibit

Washington from providing vocational funding to student at religious college) *with Locke*, 540 U.S. at 718-19 (holding that Free Exercise Clause does not require Washington to provide scholarship funds to student pursuing theology degree in preparation for service in clergy).

2. The "play in the joints" identified in the Court's religion cases does not allow the government unfettered discretion in all matters involving funding or other benefits provided to religious organizations.

The Court has identified "'play in the joints'" between the two Religion Clauses. *Locke*, 540 U.S. at 718 (quoting *Walz*, 397 U.S. at 669). Scholarships for students pursuing devotional theology degrees fall within this area of flexibility; one state may choose to provide them without violating the Establishment Clause, but another state may decline to offer them without violating the Free Exercise Clause. *See id.* at 719, 725.

Nevertheless, the joints of the Religion Clauses have only a limited range of motion. A state's discretion to provide or decline funding to or in support of religious organizations must be considered in context, with particular attention to the purpose or effect of the program or activity to be funded. The Establishment Clause places limits on the ability of the government to advance the free exercise of religion—for example, by favoring one sect over another in the allocation of public funds. *See, e.g., Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 840 (1995) (stating that a tax "for the direct support of a church or group of churches ... would run contrary to Establishment Clause concerns dating from the

earliest days of the Republic"); *Everson*, 330 U.S. at 15 (among other things, government cannot "prefer one religion over another"). Similarly, government cannot offer incentives for parents to choose a religious education over a secular one. *See Zelman*, 536 U.S. at 653.

A government that seeks to avoid favoring religion is constrained by the Free Exercise Clause in just how far it may extend its anti-establishment philosophy. For example, in *Widmar*, a case that also involved the Missouri constitution, the Court stated that the State's interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause" was "limited by the Free Exercise Clause and in this case by the Free Speech Clause as well." 454 U.S. 263, 276 (1981). *See also McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (invalidating state statute barring ministers from serving as delegates to constitutional convention); *Mitchell*, 530 U.S. at 835 n.19 (plurality opinion) (stating that "exclusion of religious schools" from federal-state aid program "would raise serious questions under the Free Exercise Clause"). And even the dissenters in *Mitchell* agreed that the withholding from religious groups of public benefits, "extended in modern times to virtually every member of the population and valuable to every person and association," is impermissible. *Mitchell*, 530 U.S. at 874 (Souter, J., dissenting). Such denials, Justice Souter wrote, "could be said to 'hamper' religious exercise indirectly." *Id.* And no one suggests that a local government could deny basic public services, such as police and fire protection, to churches and other religious organizations. *See Everson*, 330 U.S. at 17-18.

3. The Free Exercise Clause governs when a state's only valid anti-establishment concern is that an applicant for governmental funding is a religious institution.

In particular circumstances, a state might point to a number of different factors that could support a decision, in furtherance of its anti-establishment policies, to refuse to provide funding to, or for the benefit of, a religious organization. Examples might include the following:

- Funds would be used for the education of future members of the clergy, as in *Locke*, or as salaries for current clergy;
- The program to be funded, if conducted by a religious organization, would constitute proselytizing or religious education;
- A grant relating to real property could be used to construct a house of worship, or to shift the expenses of its maintenance or operation from adherents to taxpayers;
- A grant recipient could use government funding to express a religious message that a reasonable observer might attribute to the government;
- Funds intended for a secular purpose might be diverted to religious activities;[12] or

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[12] The plurality in *Mitchell* rejected the mere possibility of diversion of funding as a relevant factor in an Establishment Clause analysis. *See Mitchell*, 530 U.S. at 820. Other justices disagreed. *See id.* at 902-03 (Souter, J., dissenting). The Court also did not fully resolve the significance of systematic actual diversion of funds. Whether a government grantor may rely on

- A grant applicant might pressure recipients of government-funded social services to join the faith or participate in religious services, or an applicant may have a history of such behavior.

In future cases, the Court may need to consider whether these or other concerns, individually or in combination, could support the decision of a government grantor to exclude a religious organization, or some or all religious organizations, from a program of public funding. But that difficult question is not presented in this case, in which none of these factors is present. *See Widmar*, 454 U.S. at 275-76 (finding it unnecessary to decide whether Missouri's anti-establishment interests could ever outweigh free-speech interests of religious group).

The only conceivable objection that Missouri has raised, or could have raised, to Trinity Lutheran's grant application is that the playground is owned by a church.[13] That is a far cry from the "historic and substantial state interest" in avoiding funding of religious instruction identified by the Court in *Locke*, 540 U.S. at 725. When the government provides funding for a facially secular purpose, discrimination against an applicant solely because it is a church advances no legitimate anti-establishment concern. *See generally Hunt v. McNair*, 413 U.S. 734, 742 (1973)

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the possibility of diversion to restrict or condition a grant remains an unresolved question.

[13] The State's justification is even weaker if it is not regularly enforced. The State's own website reveals that prior tire-grant recipients include Christian Chapel Academy, the First Baptist Church of Belton, Bourbon Seventh-Day Adventist School, St. Therese Church of the Diocese of Kansas City, and Torah Prep. *See* http://dnr.mo.gov/env/swmp/tires/documents/PriorRecipientsofScrapTireMaterialGrants2014.pdf.

(rejecting "the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation"). A funding disqualification in these circumstances serves only to inhibit the church's exercise of its mission and its ability to participate in public life by placing the church at a disadvantage relative to secular organizations. This is a violation of the Free Exercise Clause.

II. MISSOURI'S TIRE-GRANT PROGRAM PROVIDES FUNDING FOR A PURPOSE THAT IS APPARENTLY SECULAR AND LIKELY WOULD NOT BE PERCEIVED BY THE PUBLIC AS ADVANCING THE CHURCH'S RELIGIOUS MISSION.

Whatever the merits of a government's efforts to distinguish between religious and secular organizations when the government distributes funds that will or may be used for religious purposes, such efforts are illegitimate when the purpose of the funding is fundamentally secular and would be understood by the public as secular. Both are true in this case.

A. The Purposes of the Program Are to Dispose of Used Tires and to Enhance the Safety of Children, Including Children Unaffiliated with the Church.

A rubberized playground surface is an unlikely base for a dispute about the reach of the Religion Clauses of the First Amendment. The State's grant program is designed specifically to reduce used-tire waste. *See* Mo. Rev. Stat. § 260.273.6(2). Improved playground surfaces also promote and protect the safety of children using the playgrounds. Both of these goals

are worthy and entirely unconnected with religious matters. And Trinity Luthern has pleaded, and thus it must be accepted as true in the posture of this case, that these benefits flow not only to its members and the students at its daycare facility, but also to other members of the local community. Pet. App. 133a.

The record also reflects that Missouri awards grants under the scrap-tire program on the basis of "neutral, secular criteria that neither favor nor disfavor religion," *Agostini*, 521 U.S. at 231, except for the blanket disqualification of churches. The distribution of funding to a wide variety of applicants "is an important index of secular effect." *Widmar*, 454 U.S. at 274. Even if the State permitted religious institutions to participate in the program, it could not be mistaken for one of the "ingenious plans for channeling state aid" to religious groups that present challenging Establishment Clause issues. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 785 (1973). This is a one-time grant, and while it might be a boon to the church, it is not a means of shifting budgetary responsibility for running a church from the believer to the public treasury.

In short, Missouri's tire-grant program is, in its purpose and its operation, a thoroughly secular matter in both purpose and appearance. The categorial exclusion of churches from the program cannot withstand Free Exercise scrutiny.

B. The Record Does Not Indicate That Trinity Lutheran's Grant Application Presented Fact-Specific Grounds That Might Justify Disqualification of the Church from the Tire-Grant Program.

The distinction between whether a program or activity would *ordinarily* be considered secular and whether the *actual* use of funds by a grant applicant is secular is an important one, particularly in an as-applied challenge. The Court's decision in this case cannot and should not require governments to provide funding to churches or other religious organizations merely because the use of funds, at an abstract level, appears to be secular in nature. A governmental grantor should be permitted to identify unusual or inappropriate uses of funds that, in context, would qualify as religious rather than secular. In other words, particular facts may cause an activity that normally would be considered secular to fall within the play-in-the-joints range, so that the government's anti-establishment concerns have some grounding and might justify a denial of funding. But the Court is not required to delineate the boundaries of that possibility here.

As with the more general line-drawing issue discussed above, the Court need not determine in this case precisely what sorts of facts could cause a generally secular project to be essentially religious and thus justify a denial of government funding. Missouri has not argued or suggested that Trinity Lutheran's playground is in any way unusual, nor that Trinity Lutheran had plans to imbue a state-funded renovation of the playground with religious meaning or messaging. The playground at issue in this case appears to be just a playground, and the State's

decision not to provide funding for it thus appears to be based only on the fact that it is owned by a church.

CONCLUSION

Trinity Lutheran's exclusion from Missouri's tire-grant program cannot be justified on the basis that playground resurfacing generally, nor the resurfacing of Trinity Lutheran's particular playground, advances the religious mission of the church that owns the playground or would be perceived by a reasonable observer as having that effect. The State's disqualification of Trinity Lutheran from the program, solely on the basis that the playground is owned by a church, does not advance a legitimate anti-establishment interest of the State. Placing Trinity Lutheran at a disadvantage relative to other grant applicants merely because it is a church inappropriately hampers the church's free exercise of its religion in violation of the First Amendment.

Respectfully submitted,

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RECORD AND BRIEFS

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TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR,
MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL AND LUTHERAN CHURCH—MISSOURI SYNOD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Association of Christian Schools International ("ACSI") is a nonprofit organization that supports and promotes Christian schools across the United States and around the world. Based in Colorado Springs, ACSI has approximately 24,000 member schools—2,600 of which are in the United States—that serve more than 5.5 million students worldwide. In addition to providing various services for Christian schools (including teacher certification, school accreditation, and textbook publishing), ACSI advocates for their fair legal treatment.

The Lutheran Church—Missouri Synod, a Missouri nonprofit corporation, has approximately 6,150 member congregations, which in turn have approximately 2.2 million members. Member congregations of the Synod operate elementary schools and daycare centers throughout the United States, including in the State of Missouri, and as a group they operate the largest Protestant parochial school system in America.

In the decision below, the Eighth Circuit went far beyond this Court's decision in *Locke* v. *Davey*, 540 U.S. 712 (2004), by holding that the Free Exer-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner is a member of the Lutheran Church—Missouri Synod but made no such monetary contribution. All parties have consented in writing to the filing of this brief.

cise and Equal Protection Clauses permitted Missouri to exclude a daycare center from a playground-resurfacing grant program solely because the daycare is affiliated with a church. *See* Pet. App. 1a-22a. That rule rests on a sweeping misapplication of *Locke* that ignores foundational principles of First Amendment and equal protection jurisprudence and, if affirmed, would require overruling decades of contrary precedent. *See infra* Part I.

The rule adopted below threatens to marginalize religious schools, churches, and other faith-based entities from public life by endorsing religious discrimination against such entities in the provision of public benefits. This threat is not theoretical: As *amici* explain, *see infra* Part II, religiously affiliated persons and groups currently qualify for hundreds of public benefit programs nationwide, all of which could be—and in some instances already have been—closed to religious groups under the Eighth Circuit's reasoning.

Amici therefore urge this Court to overturn the erroneous judgment below, which is inconsistent with the Constitution's guarantee of the free exercise of religion and with our Nation's long tradition of affirming religious participation in the public square.

STATEMENT

This case arises from a Missouri aid program granting funds to "qualifying" "public and private nonprofit day care centers" for "the purchase of recycled tires to resurface playgrounds." Pet. App. 2a-3a, 35a-36a. Trinity Lutheran Church, which operates "a licensed preschool and daycare," applied for the funds offered by this program and ranked fifth out of

more than forty applicants. *Id.* at 2a-3a. But while "fourteen projects were funded" by the State, *id.* at 3a, Trinity Lutheran's was not among them. The State claimed that it was "unable to provide this financial assistance" to Trinity Lutheran because the Missouri Constitution "provides that 'no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion.'" *Ibid.* (quoting Mo. Const. art. I, § 7).

A divided panel of the Eighth Circuit affirmed the dismissal of Trinity Lutheran's claims for injunctive and declaratory relief. Because the majority misconstrued Trinity Lutheran's complaint as a "facial attac[k] on Article I, § 7 of the Missouri Constitution," Pet. App. 6a, much of its opinion focused on an inapposite summary decision by this Court upholding the constitutionality of that provision in a different context.[2] But the panel majority also relied upon *Locke* to "reinforc[e] [its] decision," and held

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[2] Specifically, the bulk of the majority opinion below focused on *Luetkemeyer* v. *Kaufmann*, 419 U.S. 888 (1974), in which this Court summarily affirmed a three-judge district court's ruling that Missouri did not violate the Free Exercise or Equal Protection Clauses by refusing to bus private-school students. *See* Pet. App. 7a-9a, 11a. *Luetkemeyer* is inapposite: In that case, all private-school students were excluded from the busing program, whereas petitioner was excluded from Missouri's recycled-tire program solely because of its religious affiliation, while secular private daycare centers were eligible to receive funds. The decision below states that *Luetkemeyer* establishes that Article I, § 7 of the Missouri Constitution is "not *facially* invalid," *id.* at 8a (emphasis altered)—making the Eighth Circuit the only court of appeals ever to cite *Luetkemeyer*'s summary decision as "controlling . . . precedent," *id.* at 7a—but as already explained, petitioner is not bringing a facial challenge.

that petitioner lacked "a valid Free Exercise claim" even if the summary decision "were not controlling." *Id.* at 10a, 12a n.3. Just as *Locke* involved "'procuring taxpayer funds to support church leaders, which [i]s one of the hallmarks of an "established" religion,'" *id.* at 10a (quoting *Locke*, 540 U.S. at 722), the majority reasoned that "the direct grant of public funds to churches" is "another of the 'hallmarks of an "established" religion'" and therefore Missouri could exclude churches from its generally available recycled-tire program, *ibid.*; *see also id.* at 12a n.3 (asserting that "the direct expenditure of public funds to aid a church is a paradigm example of" state action that is "permitted by the Establishment Clause but not required by the Free Exercise Clause" (citation and internal quotation marks omitted)).

In claiming that this case involves one of the "hallmarks of an 'established' religion," Pet. App. 10a (quotation marks omitted), the majority did not claim that providing recycled-tire grants to Trinity Lutheran would violate the Establishment Clause. To the contrary, the court acknowledged that granting recycled-tire funds to Trinity Lutheran would be "*permitted* by the Establishment Clause." *Id.* at 12a n.3 (internal quotation marks omitted) (emphasis added). Nor did the majority conclude that this specific grant to Trinity Lutheran would be contrary to some specific "historic and substantial state interest." *Locke*, 540 U.S. at 725. Rather, the majority concluded that *any* direct transfer of public funds to a religiously affiliated entity would be contrary to the State's claimed interest in maintaining a "high wall of separation between church and state," and thus could be prohibited under *Locke*. Pet. App. 12a n.3.

Judge Gruender dissented in part. He explained that the majority's interpretation of *Locke* would "leave states with unfettered discretion to exclude the religious from generally available public benefits." Pet. App. 26a (opinion of Gruender, J.). "If giving [Trinity Lutheran] a playground-surfacing grant raises a substantial antiestablishment concern," he continued, "the same can be said for *virtually all government aid* to [a religious organization], no matter how far removed from religion that aid may be." *Id.* at 29a (emphasis altered). Because *Locke* did not authorize the "wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support," he would have upheld Trinity Lutheran's free exercise and equal protection claims. *Id.* at 27a.

SUMMARY OF ARGUMENT

I. Faithful application of existing precedent is more than sufficient to dispose of this case. The Free Exercise and Equal Protection Clauses prohibit the government from discriminating against religion, including in the provision of public benefits, absent the most compelling justification. *See, e.g.*, *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993); *McDaniel* v. *Paty*, 435 U.S. 618 (1978). Government "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16 (1947).

The decision below held that *Locke* v. *Davey*, 540 U.S. 712 (2004), compels the opposite conclusion. *See* Pet. App. 12a n.3. But *Locke* did not purport to cast aside the Constitution's bedrock principle of nondiscrimination; it merely recognized a narrow, historically rooted qualification of that principle, tied to the unique concerns associated with publicly funding the devotional training of clergy. *See* 540 U.S. at 721-25. Indeed, as the majority explained and the principal dissent agreed, "the only interest at issue" in *Locke* was "the State's interest in not funding the religious training of clergy." *Id.* at 722 n.5; *accord id.* at 734 (Scalia, J. dissenting). *Locke* expressly disclaimed a rule that would deny public benefits to religiously affiliated persons based on the State's mere "philosophical preference" to promote secularism by withholding funds from these groups. *Id.* at 722 n.5 (majority opinion).

There is no "historic and substantial state interest" (*Locke*, 540 U.S. at 725) in excluding religious entities from recycled-tire programs. To adopt the Eighth Circuit's interpretation of *Locke*, then, would be to constitutionalize "latent hostility to religion" by permitting States to exclude religious actors from the ever-expanding number of religiously neutral public benefit programs provided by "the modern administrative state" whenever the State *claims* a historic and substantial interest in their exclusion. *Cty. of Allegheny* v. *ACLU*, 492 U.S. 573, 657-58 (1989) (opinion of Kennedy, J.). It would thus require reading *Locke* as implicitly upending decades of precedent forbidding religious discrimination. That is inconsistent with the Constitution and unsupported by *Locke*. This Court should reject the Eighth Circuit's

transformation of *Locke* into a license for religious discrimination, and reverse the judgment below.

II. If allowed to stand, the Eighth Circuit's rule would justify the wholesale exclusion of religiously affiliated entities from innumerable state and local aid programs across the country, based on little more than religious animus. For as the dissent below explained, "[i]f giving [Trinity Lutheran] a playground-surfacing grant raises a substantial antiestablishment concern, the same can be said for *virtually all government aid* to [a religious organization], no matter how far removed from religion that aid may be." Pet. App. 29a (opinion of Gruender, J.) (emphasis altered).

Like their secular counterparts, religious organizations are frequently eligible for direct or indirect aid from neutral government programs supporting activities that benefit the public. Beyond grants for resurfacing playgrounds with recycled tire rubber, these programs include, for example, funds ensuring that children attending private primary and secondary schools receive access to health and educational services, affordable transportation and textbooks, and even security guards and safety equipment. School vouchers, tax credits, and scholarships for families of schoolchildren are also common forms of aid, as are construction grants. Outside the education context, States administer programs that encourage tourism and other economically beneficial activities, contract with private organizations to provide services, and provide aid to entities like rehabilitation centers. Yet under the expansive rule adopted below, religious institutions could be excluded not only from these programs, but also from receiving

any form of basic public support—such as fire protection and sidewalk maintenance—solely on account of their religious affiliation. Reversal is warranted to prevent the government from engaging in active hostility to religion and leveraging the weight of the omnipresent administrative state against religious conviction.

ARGUMENT

The Free Exercise Clause and the Equal Protection Clause ensure that the government "cannot exclude" religious groups "from receiving the benefits of public welfare legislation" "because of their faith." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16 (1947) (emphasis removed). Yet the rule adopted by the Eighth Circuit below would permit precisely this type of facial religious discrimination, authorizing States to exclude religious groups from public aid programs (such as the ones identified in Part II below) notwithstanding the absence of any Establishment Clause concern or other substantial interest in preventing public funds from being used for religious purposes. Strict scrutiny is appropriate, and neither *Locke* v. *Davey*, 540 U.S. 712 (2004), nor any other precedent of this Court suggests otherwise. The judgment below should be reversed.

I. DISCRIMINATION AGAINST RELIGION VIOLATES THE FREE EXERCISE AND EQUAL PROTECTION CLAUSES.

This Court need not fashion a new rule of law to preserve an equal role for religious persons and institutions in public life. Time and again, the Court has affirmed the "noncontroversial principle" that laws singling out religion for adverse treatment offend the

Constitution. *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 559 (1993) (opinion of Souter, J.). To enforce this principle, the Court has held that claims of discrimination against religion trigger the strictest scrutiny. *See, e.g.*, *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978) (plurality opinion) (citing *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972)). *Locke* did not implicitly overrule or reject this framework, as the Eighth Circuit's holding suggests, nor does *Locke*'s narrow, historically rooted reasoning support the Eighth Circuit's decision below.

A. The Free Exercise And Equal Protection Clauses Entitle Religion To At Least Neutral Treatment By The Government.

As "confound[ing]" as this Court's religious-freedom jurisprudence has sometimes been, *Utah Highway Patrol Ass'n* v. *Am. Atheists, Inc.*, 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting from denial of certiorari), few constitutional rules are as settled or as foundational as the rule that, at a minimum, the government must treat religion with neutrality.[3] Almost seventy years ago, the Court recognized that the Constitution "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to

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[3] There are circumstances, moreover, in which the government is allowed or even required to afford special protection to religious exercise. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694 (2012); *Marsh* v. *Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting); *Thomas* v. *Review Bd.*, 450 U.S. 707, 713 (1981); *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 306 (1963) (opinion of Goldberg, J.).

handicap religions, than it is to favor them." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 18 (1947). Even after decades of doctrinal shifts in this area, the neutrality principle has remained the "touchstone" of analysis under the Religion Clauses of the First Amendment. *McCreary Cty.* v. *ACLU*, 545 U.S. 844, 860 (2005); *see also Van Orden* v. *Perry*, 545 U.S. 677, 698 (2005) (opinion of Breyer, J.); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845 (1995).

There is good reason for this neutrality rule: Neutrality makes possible "[t]he fullest realization of true religious liberty" by requiring "that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 305 (1963) (opinion of Goldberg, J.). An "emphasis on equal treatment" is appropriate because in our constitutional tradition, "one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 715 (1994) (opinion of O'Connor, J.). In a time of extensive government involvement in the everyday lives of the people, neutrality acknowledges that religious institutions and persons hold a valuable place in the community. Indeed, "as the modern administrative state expands to touch the lives of its citizens" in "diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality." *Cty. of Allegheny* v. *ACLU*, 492 U.S. 573, 657-58 (1989) (opinion of Kennedy, J.).

In the free exercise context, neutrality means that, absent the most compelling justification, the government may not, on the basis of religious distinctions, treat religious people, institutions, and interests less favorably than their secular counterparts. "At a minimum," the Court has stated, "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi*, 508 U.S. at 532. This neutrality principle derives from both the Free Exercise and Equal Protection Clauses. *See Kiryas Joel*, 512 U.S. at 715 (opinion of O'Connor, J.); *Church of Lukumi*, 508 U.S. at 540 (plurality opinion); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 696 (1970) (opinion of Harlan, J.) ("Neutrality in its application requires an equal protection mode of analysis.").

The Constitution's requirement of neutrality is implicated whenever the government denies a person a right, privilege, or benefit on the basis of his or her religious affiliation, because "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas* v. *Review Bd.*, 450 U.S. 707, 716 (1981).[4] Given that the inclusion

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[4] *See also, e.g.*, *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 696 (2002) (Souter, J., dissenting) ("Neutrality in this sense refers, of course, to evenhandedness in setting eligibility as between potential religious and secular recipients of public money."); *Roemer* v. *Bd. of Pub. Works*, 426 U.S. 736, 746-47 (1976) (plurality opinion) ("[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all. . . . The Court never has held that religious activities must be dis-

of religion in neutral government programs frequently conforms with the Establishment Clause, *see, e.g.*, *Mitchell* v. *Helms*, 530 U.S. 793, 809 (2000) (plurality opinion), it is difficult, if not impossible, to reconcile government actions that "impose special disabilities" on religious applicants for government benefits with the Constitution's requirement of neutrality, *Emp't Div.* v. *Smith*, 494 U.S. 872, 877 (1994).

The Court has applied this understanding of neutrality in a host of cases rebuffing attempts to partition off religion from the public square. In *McDaniel*, for example, the Court considered a Tennessee statute that barred ministers from serving as delegates to the State's constitutional convention. 435 U.S. at 620-21. Noting that Tennessee recognized a "right of its adult citizens generally to seek and hold office as legislators or delegates to the state constitutional convention," the Court held that the statute violated the Free Exercise Clause because it prevented ministers from exercising this generally available right on the basis of their religious affiliation and without adequate justification. *Id.* at 626. Similar logic has prevailed in a series of decisions involving the efforts of religious groups to exercise

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criminated against in this way."); *Everson*, 330 U.S. at 16 ("[The States] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1, 35 (1989) ("[A] regulation is not neutral in an economic sense if, whatever[r] its normal scope or its intentions, it arbitrarily imposes greater costs on religious than on comparable nonreligious activities.").

their First Amendment speech rights on equal terms. *See, e.g.*, *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 120 (2001) (holding that a public school's exclusion of a private Christian group from its facilities violated the First Amendment); *Rosenberger*, 515 U.S. at 845 (holding that a university compromised "[t]he neutrality commanded of the State by the separate Clauses of the First Amendment" by refusing to extend generally available printing funds to a religious student paper); *Widmar* v. *Vincent*, 454 U.S. 263, 276-77 (1981) (holding that a university had unconstitutionally discriminated against religious speech). In these cases and others, the Court has vindicated the neutrality principle by requiring the government to treat religion equally when administering public programs.

The meaning of neutrality may not be "self-revealing" in every potential application, of course. *Church of Lukumi*, 508 U.S. at 561 (opinion of Souter, J.). But any meaningful conception of neutrality would be offended by a law that singles out and discriminates against religion on its face. *See id.* at 533 (majority opinion). This Court has made clear that such laws are intolerable under the Constitution by repeatedly confirming that the Free Exercise and Equal Protection Clauses demand neutral treatment of religion by the government.

B. Violation Of The Neutrality Principle Triggers Strict Scrutiny.

To enforce this guarantee of equal treatment, claims of discrimination on the basis of religious affiliation "must undergo the most rigorous of scrutiny." *Church of Lukumi*, 508 U.S. at 546; *accord*

Smith, 494 U.S. at 886 n.3 (classifications based on religion are analyzed like "classifications based on race, or on the content of speech" (citations omitted)); *McDaniel*, 435 U.S. at 628; *Yoder*, 406 U.S. at 215. Accordingly, laws that target "a particular religion" or "religion in general" for less favorable treatment "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of Lukumi*, 508 U.S. at 531-32; *see also id.* at 531 (a law burdening religion must be both "neutral and of general applicability" to avoid strict scrutiny).

This Court's cases have faithfully applied strict scrutiny to state and local laws that discriminate on the basis of religion. In *Church of Lukumi*, for example, this Court applied strict scrutiny to invalidate city ordinances that prohibited ritualistic animal sacrifice. 508 U.S. at 524, 527-28. After finding that the challenged ordinances were neither neutral nor laws of general applicability, *see id.* at 533-46, the Court concluded with relative ease that the ordinances could not withstand strict scrutiny—they were both over- and under-inclusive in light of the neutral government interests offered in their support, betraying their discriminatory intent. *See id.* at 546-47 ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.").

Church of Lukumi's application of strict scrutiny was neither unique nor controversial; it simply stayed the course set by other foundational free exercise cases. In *Employment Division* v. *Smith*, for in-

stance, the Court similarly noted that even though the First Amendment does not necessarily entitle religious persons to special exemptions from neutral, generally applicable laws that incidentally burden their religious exercise, strict scrutiny applies to laws that "classif[y] based on religion." 494 U.S. at 886 n.3. In *McDaniel*, the Court likewise reaffirmed that discrimination against religion with respect to generally available civil rights and public benefits can be justified by "only those interests of the highest order." 435 U.S. at 628 (quoting *Yoder*, 406 U.S. at 215); *see also Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.) ("[W]hen the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.").

In spite of these decisions, however, legislative bodies and government officials have continued to "devise mechanisms, overt or disguised," that single out religion for adverse treatment. *Church of Lukumi*, 508 U.S. at 547. Rigorous judicial scrutiny of such schemes is necessary to preserve "the Nation's essential commitment to religious freedom." *Id.* at 524.[5]

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[5] For that reason, numerous courts of appeals—including the Eighth Circuit, in a decision that went conspicuously unmentioned below—have followed this Court in applying strict scrutiny to reverse judgments upholding non-neutral laws discriminating against religion. *See, e.g.*, *Peter* v. *Wedl*, 155 F.3d 992, 996 (8th Cir. 1998) (rejecting refusal to provide a full-time aide to a disabled child who attended a private religious school, where similar services were provided to secular private schools); *Hartmann* v. *Stone*, 68 F.3d 973, 978 (6th Cir. 1995)

C. Missouri's Violation Of The Neutrality Principle In This Case Fails Strict Scrutiny And Is Not Justified By *Locke*.

The principles outlined above are directly applicable here and dispose of this case in short order. First, Missouri's denial of Trinity Lutheran's grant application was indisputably non-neutral and discriminatory, because it was based solely on petitioner's religious affiliation; if petitioner were instead Secular Daycare, it would have received the funding it applied for. *See* Pet. App. 3a.

Second, Missouri cannot satisfy strict scrutiny. The only state interest it has identified to support its discrimination against petitioner is a desire to comply with a state constitutional provision providing for "greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution"—an interest that this Court has *already held* does not justify discriminatory treatment of religion in the provision of public benefits. *Widmar*, 454 U.S. at 276; *see also* Pet. Br. 28-30.[6] Under this Court's precedents, the sort of

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(invalidating U.S. Army regulations forbidding Army-certified childcare providers to engage in any religious practices during their daycare programs).

[6] Although *Widmar* was primarily a free-speech case, it implicated the Free Exercise Clause because it involved the University of Missouri at Kansas City's refusal to allow a religious student group to meet in university buildings. *See* 454 U.S. at 265. The university justified its discrimination against the group by asserting a compelling interest in complying with the same state constitutional provision invoked by the State here. *See id.* at 275 & n.17. This Court rejected the university's justification, holding that "the state interest asserted here . . . is

"gratuitous" discrimination against religion practiced by Missouri is unambiguously unconstitutional. *Church of Lukumi*, 508 U.S. at 538 (quoting *McGowan* v. *Maryland*, 366 U.S. 420, 520 (1961) (opinion of Frankfurter, J.)).

The State suggests, however, that *Locke* calls into question the well-established rule that discrimination against religion is impermissible under the Constitution. *See* Br. in Opp. 2-3. But *Locke* cannot bear the weight the State places on it. *Locke* did not purport to rewrite this Court's First Amendment and equal protection jurisprudence; to the contrary, *Locke* expressly *disclaimed* adopting a rule that would allow States to deny public benefits to religiously affiliated persons based on the State's mere "philosophical preference" for secularism. 540 U.S. at 722 n.5. And the Court has repeatedly reiterated the nondiscrimination principle since *Locke*. *See, e.g.*, *McCreary Cty.*, 545 U.S. at 860. A broader understanding of *Locke* would require holding that a narrow qualification has swallowed a fundamental rule.

Locke is a self-consciously narrow decision. Both the majority and the principal dissent in *Locke* agreed that "the only interest at issue" was "the State's interest in not funding the religious training of clergy." 540 U.S. at 722 n.5; *accord id.* at 734 (Scalia, J., dissenting). And the majority's reasons

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limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech." *Id.* at 276.

for upholding the program were rooted in history and heavily fact-dependent. The Court made much of the Nation's long history of resisting public funding of the clergy specifically, which justified the State's decision to decline to fund the religious training of future ministers. *See id.* at 722-23 (majority opinion) ("[R]eligious instruction is of a different ilk."); *cf. Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1819 (2014) ("Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."). And the Court emphasized that, unlike the ordinances at issue in *Church of Lukumi*, Washington State's scholarship program went "a long way toward including religion in its benefits" because it allowed students to attend "pervasively religious" schools and take individual devotional theology courses. *Locke*, 540 U.S. at 724-25.

Based on these factors, several lower courts and commentators have correctly understood *Locke* as a narrow ruling with no sweeping implications for the right of religious persons and entities to receive equal treatment from the government. In *Colorado Christian University* v. *Weaver*, for example, Judge McConnell concluded that *Locke*'s holding does not control even all cases involving public funding of religious education: "[W]e cannot accept the . . . argument that *Locke* subjects all 'state decisions about funding religious education' to no more than 'rational basis review.'" 534 F.3d 1245, 1254-55 (10th Cir. 2008).

Rather, *Locke* "suggests, even if it does not hold, that the State's latitude to discriminate against religion . . . does not extend to the wholesale exclusion of

religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian*, 534 F.3d at 1255. Judge Gruender agreed in his dissenting opinion below. *See* Pet. App. 26a ("*Locke* did not leave states with unfettered discretion to exclude the religious from generally available public benefits."). And Professor Laycock, among others, has also persuasively argued that the scope of *Locke*'s holding is not as broad as some have suggested. *See* Douglas Laycock, *A Syllabus of Errors*, 105 Mich. L. Rev. 1169, 1184 (2007) (book review); Thomas C. Berg, *Religious Choice and Exclusions of Religion*, 157 U. Pa. L. Rev. PENNumbra 100, 108 (2008) ("[A] broad reading of *Locke v. Davey* is far from compelled.").

Locke's context-specific rationale renders it inapposite in this case. Unlike in *Locke*, the State here has not gone "a long way toward including religion" in the program at issue, 540 U.S. at 724—the recycled-tire program flatly excluded Trinity Lutheran because it is a church, *see* Pet. App. 3a, and thus "single[s] out" religion "for discriminatory treatment," *Church of Lukumi*, 508 U.S. at 538. And unlike in *Locke*, the State's discriminatory policy is not rooted in a specific, longstanding historical practice like the prohibition of public funding of clerical training. *See* 540 U.S. at 722-23. In support of its policy, Missouri points to nothing more than "a general prohibition on aid to a church that is in no way specific to the playground-surfacing grant program." Pet. App. 28a (opinion of Gruender, J.); *see* Br. in Opp. 10-11. The State has not linked its treatment of Trinity Lutheran to any "historic and substantial state interest" implicating the State's relationship

with churches, *Locke*, 540 U.S. at 725, because it cannot do so: There is no longstanding tradition of excluding religious groups from neutral public benefits that are otherwise made broadly available. Indeed, even if *Locke* had purported to upend decades of precedent by granting States broad authority to discriminate against religion in administering public programs, the substantial differences between *Locke* and this case would point to a different result here.

In any event, *Locke* plainly did no such thing—instead, it recognized a narrow, historically rooted qualification to neutrality, a caveat that does not apply to this case. Applying the neutrality principle here would both properly delineate the parameters of *Locke* and vindicate this Court's prior holdings that facial discrimination against religion cannot be squared with the Constitution's vision of equality and religious freedom.

II. THE DECISION BELOW LICENSES RELIGIOUS DISCRIMINATION IN MYRIAD EXISTING BENEFITS PROGRAMS.

The rule adopted by the Eighth Circuit below would do much more than allow States with "Blaine Amendments"—state constitutional provisions barring public aid to "sectarian" schools, *see, e.g.*, *Mitchell*, 530 U.S. at 828-29 (plurality opinion)—to exclude religious organizations from their playground-resurfacing grant programs.[7] The Eighth Circuit's

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[7] Nebraska, Kentucky, and Kansas operate their own recycled-tire programs. *See* Press Release, Neb. Dep't of Envtl. Quality, More Than $2 Million Awarded for Tire Collection, Recycling Projects (June 12, 2015), http://tinyurl.com/zm6m2on; *Waste Tire Program*, Ky. Dep't for Envtl. Prot., Div. of Waste

reasoning would enable the government to exclude religious organizations from any number of neutral public benefit programs that they otherwise qualify for—the State would need only to claim a desire to erect a "high wall of separation between church and state," Pet. App. 12a n.3, to engage in such discriminatory conduct. That result evinces "latent hostility," not neutrality, toward religion, as it would permit the government "in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious." *Cty. of Allegheny*, 492 U.S. at 657 (opinion of Kennedy, J.). Imposing the Eighth Circuit's rule on the Nation would have staggering consequences for religious organizations' participation in public life.

A. School Aid Programs

1. School aid programs directly supporting students' health and education are one important area in which the Eighth Circuit's rule could justify barring children and their parents from a wide range of benefits solely because they attend religious private schools rather than secular ones. Pennsylvania, for example, provides medical services to students at all private schools (secular or religiously affiliated), granting these children access to school nurses, medical and dental examinations, diagnostic and evaluative psychological and visual services, vision and

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Mgmt. (2014), http://tinyurl.com/zdwemd5; *Waste Reduction, Public Education, & Grants*, Kan. Dep't of Health & Env't, http://tinyurl.com/jnpg79z (last visited Apr. 20, 2016) (providing lists of grant recipients). Like Missouri, each of these States could cite provisions in their constitutions to exclude religious entities from participation. *See* Neb. Const. art. VII, § 11; Ky. Const. § 184; Kan. Const. art. 6, § 6(c).

hearing tests, and tuberculosis screenings.[8] Other States have similar programs.[9] Many parents whose children attend religiously affiliated primary schools also rely on public funding to diagnose, treat, and educate students who have special gifts or educational needs.[10] And many States provide transportation to students attending private schools, or loan textbooks, lab equipment, computers, software, projection equipment, and other materials to nonpublic schools.[11]

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[8] 24 Pa. Stat. and Cons. Stat. Ann. §§ 9-923.1-A, 2-A; *id.* §§ 14-1402 to -1403.

[9] New Hampshire, New Jersey, New York, and Ohio also permit or require health services to be offered to students at both religious and secular private schools. N.H. Rev. Stat. Ann. § 189:49; N.J. Stat. Ann. § 18A:40-25; N.Y. Educ. Law § 912; Ohio Rev. Code. Ann. § 3317.06.

[10] *See, e.g.*, Ohio Rev. Code Ann. § 3317.06 (granting private school students in Ohio access to therapeutic psychological treatment, speech and hearing diagnostic programs, and guidance and counseling services, as well as programs for disabled and gifted students); 24 Pa. Stat. and Cons. Stat. Ann. § 9-922.1-A(a)-(c) (extending guidance, counseling, and testing services, remedial learning programs, speech, hearing, and psychological services, ESL programs, and assistance for exceptional students "on an equal basis . . . to all pupils in the Commonwealth in both public and non-profit private schools").

[11] *See, e.g.*, *Nonpublic Schools*, N.Y. State Educ. Dep't, http://tinyurl.com/cgexeke (last visited Apr. 20, 2016) (transportation); Ohio Rev. Code Ann. § 3317.06(A), (K)-(L) (textbook, computer, and software loans); 24 Pa. Stat. and Cons. Stat. Ann. § 9-923-A(a)-(c) (lab equipment, projecting devices, and other loans). Rhode Island reportedly spent over $5 million in financial support for its textbook and transportation programs in 2014 alone. Bob Plain, *State Spends $5 Million on Private*

There is no doubt that these school aid programs are consistent with the Establishment Clause. *See, e.g.*, *Lemon* v. *Kurtzman*, 403 U.S. 602, 616-17 (1971) (noting that providing public health services, busing, and textbooks "in common to all students" does not "offend the Establishment Clause"). But under the logic of the Eighth Circuit's decision, States can withdraw these benefits at will from students who attend parochial schools, while retaining them for secular private schools—perhaps citing Blaine Amendments or similar laws for support.[12]

2. The ruling below also threatens aid programs that ensure schoolchildren's safety. Several States provide funding for campus security as a safeguard against mass shootings and acts of terror. Michigan, for example, allows both public and nonpublic schools to partner with local law enforcement organizations and apply for competitive security grants from the Michigan State Police, with funds being used to install shatterproof glass, metal detectors, and public address systems on campus for use in an emergency.[13] Private religious schools are eligible

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School Transportation, Textbooks, RI Future (Apr. 7, 2015), http://tinyurl.com/hnn59qe.

[12] *Cf.* N.Y. Const. art. XI, § 3 (prohibiting the direct or indirect use of public money to aid "any school or institution of learning wholly or in part under the control of direction of any religious denomination"); Pa. Const. art. III, § 15 ("No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.").

[13] *School Safety Competitive Grant Program (FY 2015)*, Mich. State Police, Grants & Cmty. Servs. Div., http://tinyurl.com/jmbsfz4 (last visited Apr. 20, 2016).

for these funds on equal terms with their secular counterparts and have been awarded thousands of dollars under Michigan's program.[14] Connecticut, Ohio, and Pennsylvania offer similar safe-school programs.[15]

The Eighth Circuit's rule, however, would allow States to exclude students at religiously affiliated primary schools from these programs. The threat is not hypothetical: The Mayor of New York City recently signed an ordinance that provides nearly $20 million to all private schools (including religious schools) with 300 or more students to hire security guards.[16] The measure encountered opposition insofar as it included religious schools on the same terms as other private schools, but its sponsor—channeling this Court's First Amendment and equal protection precedents—responded that "[s]eparation of church and state doesn't mean that we treat the church worse. It means that no one gets a preference, but that certainly we treat the church the same—

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[14] *Michigan State Police Competitive School Safety Grant Awards*, Mich. State Police, Grants & Cmty. Servs. Div., http://tinyurl.com/hy3oygn (last visited Apr. 20, 2016).

[15] *See Gov. Malloy Announces Additional Funding to Make Schools Safer*, Conn. Dep't of Emerg. Servs. & Pub. Prot. (Oct. 31, 2014), http://tinyurl.com/gr9ho2m; *Round Two: School Security Grant Program*, Ohio Facilities Constr. Comm'n, http://tinyurl.com/htvcswx (last visited Apr. 20, 2016); *2015-2016 Safe Schools Targeted Grants*, Pa. Dep't of Educ., http://tinyurl.com/j9vagn9 (last visited Apr. 20, 2016).

[16] *Transcript: Mayor de Blasio Holds Public Hearing for and Signs Intros. 108-A, 603-A, 604-A, 908-A and 916-A and Signs Intros. 609-A, 65-A, 128*, Office of Mayor (Jan. 5, 2016), http://tinyurl.com/jyzzobq.

equally."[17] The rule adopted below, however, would legitimize complete exclusion of religiously affiliated elementary schools from the safety program—forcing parents to consider whether a private education at a religiously affiliated private school is worth the risk.

3. The Eighth Circuit's ruling could also prevent lower-income students from attending religiously affiliated primary schools in the first place. Many States offer programs that make these schools affordable for parents and their children. At least thirteen States, for instance, offer tuition vouchers or scholarships that families may use at private schools of their choice.[18] Other States, like Nevada, award broader grants to parents of private-school children that can be used for tuition, textbooks, tutoring, or transportation.[19] And fourteen States grant tax credits to individuals who donate money to nonprofit organizations that, in turn, distribute those funds to

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[17] Yochonon Donn, *De Blasio Signs Parochial School Security Bill Into Law*, Hamodia (Jan. 5, 2016), http://tinyurl.com/hh7khrc.

[18] *See School Voucher Laws: State-by-State Comparison*, Nat'l Conf. of State Legislatures, http://tinyurl.com/k6hss9m (last visited Apr. 20, 2016).

[19] *See* Lindsey Burke, *Nevada Becomes Fifth State To Enact Groundbreaking Education Savings Accounts*, Daily Signal (June 2, 2015), http://tinyurl.com/zvqv6ne; *Education Savings Account*, Nev. State Treasurer, http://tinyurl.com/q7mhgu3 (last visited Apr. 20, 2016). The Nevada program has been preliminarily enjoined on the ground that it violates state law governing the diversion of funds appropriated for the operation of public schools. *Lopez* v. *Schwartz*, No. 15 OC 207 1B (Nev. Dist. Ct. Jan. 11, 2016), http://tinyurl.com/z65bpmm. A separate lawsuit claiming that the program violates Nevada's Blaine Amendment is still pending.

students as scholarships to attend the schools of their choice, including religious schools.[20]

The Establishment Clause poses no obstacle to these programs. *See, e.g.*, *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). But the Eighth Circuit's reading of *Locke* would allow States to bar religious private schools from any access to these funds, reserving them solely for secular private schools. *Cf. Taxpayers for Pub. Educ.* v. *Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015) (adopting reasoning similar to the Eighth Circuit's to invalidate a scholarship program), *petitions for cert. filed*, Nos. 15-556, 15-557, 15-558 (Oct. 27-28, 2015); *Bush* v. *Holmes*, 886 So. 2d 340 (Fla. Ct. App. 2004) (en banc) (relying on *Locke* to invalidate voucher program); *Chittenden Town Sch. Dist.* v. *Dep't of Educ.*, 738 A.2d 539 (Vt.) (invalidating tuition-reimbursement program under state constitution), *cert. denied*, 528 U.S. 1066 (1999). Montana's tax-credit program, for example, excludes religiously affiliated primary schools entirely because state officials believed that the state constitution requires that result,[21] despite the state solicitor general's warning that *Locke* does not "sanc-

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[20] *See Scholarship Tax Credits*, Nat'l Conf. of State Legislatures, http://tinyurl.com/z8e2b9n (last visited Apr. 20, 2016).

[21] Heather Kays, *Montana Officials Propose Exclusion of Religious Schools from Scholarship Program*, Heartland Inst. (Nov. 26, 2015), http://tinyurl.com/jegh6a3 (citing statements by state officials).

tion the wholesale exclusion of religion from the scholarship program."[22]

4. Private schools also sometimes use public funds to build or renovate their campuses, and the decision below could be used to deny these funds to religious private schools as well. Maryland, for example, operates an Aging Schools program that awards grants to nonpublic schools regardless of their religious status to bring their aging facilities up to date.[23] And in 2013, New Jersey awarded $1.3 billion for 176 higher education construction projects to public and private universities.[24] Two recipients of these construction grants—the Princeton Theological Seminary and rabbinical school Beth Medrash Govoha—are currently defending their grants in New Jersey state court, where the plaintiffs argue that the state constitution bars these grants for building funds based on the same reading of *Locke* that the Eighth Circuit adopted.[25]

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[22] Ex. 3 to Compl., *Espinoza* v. *Mont. Dep't of Revenue*, No. DV-15-1152A (Flathead Cty. Dist. Ct. Dec. 15, 2015), http://tinyurl.com/jbbdf79.

[23] *Non-Public Aging School Program Documents*, Md. Pub. Sch. Constr. Program, http://tinyurl.com/gtqtmj8 (last visited Apr. 20, 2016).

[24] Press Release, N.J., Governor Christie Announces $1.3 Billion for Higher Education Construction, Putting Thousands to Work and Improving Facilities for 350,000 Students (Apr. 29, 2013), http://tinyurl.com/z83tq5s.

[25] Reply Br. 26 & n.11, *ACLU* v. *Hendricks*, No. A-4399-13 (N.J. Super. Ct. App. Div. July 17, 2015), http://tinyurl.com/grvhlfm.

B. Economic-Incentive And Other Programs

The Eighth Circuit's rule would also enable the exclusion of religious organizations from innumerable public aid programs outside the school context.

1. As one of many possible examples, the holding below invites States to bar religious entities from tax-incentive programs offered on a neutral basis to companies that invest in projects that spur economic growth. For instance, Kentucky offers companies a sales-tax rebate to entice them to build tourist attractions within its borders that will create jobs for local residents and boost the State's economy. *See* Ky. Rev. Stat. Ann. § 148.850 *et seq.* Approval for qualifying projects is based on statutory criteria unrelated to the religious affiliation of the applicant or the proposal. *Id.* § 148.853(2)(A) (approval based on the project's estimated costs, number of days the attraction will be open per year, and projected number of out-of-state visitors). Other States offer similar programs.[26] And as of 2014, more than thirty States offered tax rebates and other economic incentives worth millions of dollars to encourage film companies to produce movies and television shows within their borders.[27]

But the rule propounded by the Eighth Circuit clears a path for state governments to exclude reli-

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[26] Arkansas Tourism Development Act, Ark. Code Ann. § 15-11-501 *et seq.*; Georgia Tourism Development Act, Ga. Code Ann. § 48-8-270 *et seq.*

[27] *State Film Production Incentives & Programs*, Nat'l Conf. of State Legislatures (Mar. 28, 2014), http://tinyurl.com/h8wp5dh.

giously affiliated entities from these programs, even if they satisfy the same neutral criteria as any secular applicant. This is illustrated by Kentucky's recent attempt to nullify a tax rebate for a nearly $100 million tourism project proposed by a religious organization. Although the project met the statutory criteria for receiving tax incentives that applied to every other company, the State defended its withdrawal of the incentive based on the same misreading of *Locke* that the Eighth Circuit adopted below. *Ark Encounter, LLC* v. *Parkinson*, No. 3:15-CV-00013, 2016 WL 310429, at *2-5 (E.D. Ky. Jan. 25, 2016); *see* Mem. in Supp. of Mot. to Dismiss 18-21, *Ark Encounter LLC* v. *Parkinson*, No. 3:15-CV-00013 (E.D. Ky. Mar. 27, 2015) (Dkt. 18-1) (citing the district court's opinion below, Pet. App. 34a).[28]

2. Religious organizations also operate rehabilitation centers and halfway houses and are eligible to receive generally available state funds on the same terms as their secular counterparts. Florida, for example, requires its Department of Corrections to "make every effort to consider qualified faith-based service groups *on an equal basis* with other private organizations" when selecting "contract providers to administer substance abuse treatment programs" to Florida inmates. Fla. Stat. § 944.473(2)(c) (emphasis added); *see also Ctr. for Inquiry, Inc.* v. *Jones*, No.

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[28] The district court in *Ark Encounter* recently granted a preliminary injunction for the applicant based on the Free Exercise Clause and other grounds. *See* 2016 WL 310429, at *19 (reasoning that "[d]espite having a facially neutral law with secular criteria, the Commonwealth is engaging in disparate treatment by allocating benefits based on distinctions among religious and non-religious groups").

2007-CA-1358 (Fla. Cir. Ct. Jan. 20, 2016), http://tinyurl.com/zltdejb (finding that a Florida program allowing faith-based entities to bid on substance-abuse treatment contracts did not violate Florida's no-aid provision).

But state courts in Florida have relied on the Florida Constitution to deny public funds to faith-based rehabilitation groups for their substance-abuse rehabilitation centers. In a preliminary ruling addressing this issue, one Florida court read *Locke* in the same way as the decision below, asserting that "a state constitutional provision, like Florida's no-aid provision, can bar state financial aid to religious institutions without violating either the Establishment Clause or Free Exercise Clause." *Council for Secular Humanism, Inc.* v. *McNeil*, 44 So. 3d 112, 121 (Fla. Dist. Ct. App. 2010), *rev. denied*, 41 So. 3d 215 (Fla. 2010).

3. Finally, the Eighth Circuit's logic has no principled stopping point, and would thus permit public officials to withdraw basic services, such as police and fire protection or sewage disposal services, from religious entities simply because they are religious—even though such a drastic result "obviously [is] not the purpose of the First Amendment." *Everson*, 330 U.S. at 18. Respondents attempt to assure this Court that these exclusions are unlikely to occur, Br. in Opp. 9-10, but they admit that no limiting principle in the ruling below would prohibit "[p]olice and fire protection policies" from "differentiat[ing] between or express[ing] a preference for one possible

recipient over another," *id.* at 9.[29] This admission is devastating, and confirms that the Eighth Circuit's rationale not only departs from this Court's precedents, but, "[t]aken to its logical extreme," would permit "a relentless extirpation of all contact between government and religion," leaving religious members of society without access to basic government services. *See Cty. of Allegheny*, 492 U.S. at 657 (opinion of Kennedy, J.).

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[29] Respondents attempt to distinguish sewage disposal and other services from fire and police protection on the ground that sewage is a fee-based service. Even assuming that were true in all jurisdictions, it misses the point: The government could still offer exemptions or discounts to secular nonprofit institutions while withholding them from religious ones. Chicago, for example, exempts nonprofit organizations from paying for water services. *See Not-for-Profit Exemption*, City of Chicago, http://tinyurl.com/h9au9u4 (last visited Apr. 20, 2016). Churches and religious groups are included under this exemption, *see* Mitch Smith & Manya A. Brachear, *Chicago Offers Compromise on Water Bill Exemptions for Nonprofits*, Chi. Trib. (Apr. 29, 2013), http://tinyurl.com/hzjhu9v, but the Eighth Circuit's rule would enable cities to deny such exemptions to religious groups while providing them to all secular groups.

CONCLUSION

The Court should reverse the judgment below and reject the Eighth Circuit's improper expansion of *Locke* v. *Davey*, 540 U.S. 712 (2004), from a narrow decision tied to the historical aversion to funding religious training for clergy, into a sweeping license to deny generally available public benefits to religious groups solely on the basis of their religious affiliation.

Respectfully submitted.

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TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,

Petitioner,

v.

SARAH PARKER PAULEY, DIRECTOR,
MISSOURI DEPARTMENT OF NATURAL RESOURCES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY AND GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI

The **Baptist Joint Committee for Religious Liberty** has vigorously supported religious liberty in the historic Baptist tradition for all of its eighty years. The BJC serves fifteen supporting organizations, including state and national Baptist conventions and conferences, and churches in Missouri and throughout the country. It addresses only religious liberty and church-state separation issues, and believes that strong enforcement of both Religion Clauses is essential to religious liberty for all Americans.[1]

In addition to supporting the free exercise protection offered by the First Amendment, the BJC has championed federal statutes, including the Religious Freedom Restoration Act of 1993, and state constitutions and statutes that protect religious liberty beyond what is required by the Free Exercise Clause.

Likewise, the BJC has steadfastly opposed the direct funding of houses of worship and other pervasively religious institutions on the grounds that such funding betrays the promise of the Establishment Clause. Similar to its support for many federal and state permissive accommodations of religion that go beyond what the Free Exercise Clause requires, the BJC supports Missouri's more explicit state constitutional no-aid provisions as a permissible policy to advance a historic

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[1] This brief was prepared entirely by amici. No other person made any financial contribution to its preparation or submission. Consents are on file with the Clerk.

and substantial religious liberty interest beyond what may be required by the Establishment Clause.

Amicus curiae **General Synod of the United Church of Christ** is the representative body of the national setting of the **United Church of Christ (UCC)**. The UCC was formed in 1957, by the union of the **Evangelical and Reformed Church** and **The General Council of the Congregational Christian Churches of the United States** in order to express more fully the oneness in Christ of the churches composing it, to make more effective their common witness in Christ, and to serve God's people in the world. The UCC has 5,000 churches in the United States, with a membership of approximately 944,000.

The General Synod of the UCC, various settings of the UCC, and its predecessor denominations, have a rich heritage of promoting religious freedom and tolerance. Believing that churches are strengthened, not weakened, by the principle of the separation of church and state, the UCC has long acknowledged its responsibility to protect the right of all to believe and worship voluntarily as conscience dictates, and to oppose efforts to have government at any level support or promote the views of one faith community more than another. At its twentieth gathering, the General Synod continued this legacy by encouraging the involvement of the United Church of Christ in a national campaign to promote the principle of the separation of church and state and the proper role of religion in society.

SUMMARY OF ARGUMENT

This Court has never held that the Establishment Clause would allow the direct funding of churches, much less that the Constitution *requires* it. From its first constitution in 1820, Missouri has prohibited state funding of churches. Similar provisions exist in thirty-nine other states, reflecting a commitment to religious freedom firmly rooted in history and experience. Indeed, special treatment of churches in our constitutional tradition, like the treatment of religion itself, is a means of protecting religious liberty, not a mark of hostility toward or discrimination against religion. It would profoundly upend our constitutional history, state and federal, to require Missouri to fund the improvement of church property.

Missouri's constitutional provision against funding churches, applied to its scrap tire program, is a legitimate bright-line rule that protects religious freedom. Tax support of churches was a primary mark of the religious establishments during the founding era and the target of colonial efforts by religious dissenters to disestablish religion from government. The hard-won battles to break free from the burden of tax support for churches were central to the development of the First Amendment and the American legal tradition of religious liberty. Churches remain the quintessential expressions of religious experience, recognized as having unique legal status and autonomy rights. It is

hardly a novel concept that the responsibility for maintaining and improving church property would rest with the church, not the state, and that states would avoid funding churches.

This Court has recognized the special dangers associated with direct funding of churches, as well as the necessity of safeguards to avoid government funding of religion in the context of other religious institutions. States, too, have long had an interest in promoting religious freedom by maintaining a separation between tax-supported endeavors and religion beyond what the Establishment Clause may require.

Missouri's constitutional no-aid provisions protect the independence and autonomy of religious institutions. The question before the Court in this case – whether it is constitutional for Missouri to operate a tax-supported program in a way designed to avoid historic and substantial anti-establishment concerns, consistent with its state constitution – was asked and answered in Chief Justice Rehnquist's majority opinion in *Locke v. Davey*. None of Petitioner's attempts to shrink the Court's decision in *Locke* are justified. Petitioner's effort to recast Missouri's constitutional prohibition on the funding of churches as a mark of constitutional suspicion, hostility, or discrimination should be rejected.

ARGUMENT

As the Court of Appeals correctly noted, Petitioner is a church that seeks an "unprecedented" ruling that the Federal Constitution not only permits, but *requires*, "the grant of public funds to a church." *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 783 (8th Cir. 2015). For many good reasons, this Court has never before had the occasion to consider a case involving a possible direct grant of monetary aid to a church.[2] In a variety of religious liberty cases, however, this Court has recognized the importance of avoiding government funding of religion, even in cases where aid to religious institutions has been upheld. In our constitutional tradition, restrictions on aid to religious institutions are never inherently suspect. On the contrary, in both federal and state law, such restrictions are widespread, long-standing, and effective means to protect crucial constitutional boundaries.

As Chief Justice Rehnquist explained with regard to a similar state constitutional provision in *Locke v. Davey*, "the United States and state constitutions embody distinct views – in favor of free exercise, but opposed to establishment." 540 U.S. 712, 721 (2004). That Missouri would establish a bright-line bar on direct funding of churches is "a product of these views, not evidence of hostility toward religion." *Id.* Missouri's categorical exclusion of churches in its scrap

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[2] In this brief, we extensively use the term "church" as representative of similar bodies organized for corporate worship.

tire program is firmly rooted in the state's constitutional law. It allows the state to avoid the risk of funding religion or policing the line between religious and nonreligious activity on church facilities. Neither equal protection nor free exercise requires the State to fund churches.

I. HISTORY, PRACTICE, AND PRECEDENT SUPPORT LEGAL PROHIBITIONS ON DIRECT GOVERNMENT FUNDING OF CHURCHES

Special treatment of churches in our constitutional tradition, like the special treatment of religion itself,[3] is a means of protecting religious liberty and the freedom and integrity of religious institutions, not a mark of hostility toward or discrimination against religion. It reflects a proper and historic understanding of the relationship between institutions of government and those of religion. Each has distinct funding sources, and each has primary roles and responsibilities that are best maintained through independence from one another.

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[3] Rejecting a claim that a church should be treated no differently than a labor union or social club, this Court recognized the special autonomy of churches as grounded in the First Amendment noting "the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

A. Tax support for churches was a central element of religious establishments and a principle impetus for the fight for religious liberty led by religious dissenters.

Breaking from their European heritage and colonial experience of government-established churches, America's Founders pursued a new vision of religious liberty that separated the institutions of religion and government. The First Amendment explicitly limited Congressional power in matters of religion: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. This separationist ideal that includes both elements of no establishment and guarantees for free exercise has also been a foundation of state constitutions, including Missouri's, intentionally seeking to protect religious liberty in ways that are distinct, and often more robust, than the First Amendment.

Leading legal scholars who have studied the establishment of religion in colonial America cite tax support of churches as a central element of religious establishments.[4] "First and foremost, [religious establishment] signified the financial support of recognized

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[4] *See* Ira C. Lupu and Robert Tuttle, *Secular Government Religious People* 5 (2014), "Through various kinds of religious establishments, governments declared and enforced orthodox beliefs, imposed taxes to support ministers and churches, and compelled attendance at worship." *See also* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003), finding six categories of establishment: "(1) control over doctrine,

ministers and their churches by the government. . . . But more than anything, a religious establishment meant an interdependency of sacred and profane institutions, whereby both the church and the state reinforced and legitimized each other." Ronald B. Flowers, Melissa Rogers, and Steven K. Green, *Religious Freedom and the Supreme Court* 15 (2008). This aspect of our country's history has long informed this Court's understanding of the proper meaning of the Religion Clauses as providing a separation between the institutions of religion and government in ways that have avoided advancement, entanglement, sponsorship, and hostility, while recognizing the important role of religious institutions. As this Court noted in upholding a permissive accommodation of a property tax exemption for churches, "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, *financial support*, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 668 (1970) (emphasis added).

The historical fight for disestablishment, led by Baptists and other religious dissenters, is well documented. Far from discriminating against religion, disestablishment marked an essential step toward the

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governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church."

protection of individual religious liberty. Disestablishment ensured that churches would not be funded through the coercive power of the state, but through the voluntary offerings of adherents, thus providing a constraint on government and a measure of religious liberty for individuals – to fund or refuse to fund religious institutions – that had long been denied.

When Virginia Baptist pastor John Leland recounted why Baptists so heartily supported the Revolution, he said it "suited their political principles, promised religious liberty, and a freedom from ministerial tax." John Leland, *The Virginia Chronicle* (1790) *reprinted in The Writings of the late Elder John Leland* 112 (Miss L.F. Greene ed., 1845). A leader of Massachusetts Baptists, Isaac Backus, complained of locales that were blending the ministerial tax into a general civil tax: "the civil charges of the town, and the ministers salary are all blended in one tax . . . so that our brethren who would readily pay their civil tax, yet cannot do it, without paying the ministers also!" Isaac Backus, *An Appeal to the Public for Religious Liberty against the Oppressions of the Present Day* (1773), http://classicliberal.tripod.com/misc/appeal.html. For colonial Baptists and other dissenters, government support for churches and clergy was a specific impetus in the fight for religious liberty.

In writing new state and federal constitutions, "evangelical dissenters insisted that these new constitutions address issues of religious liberty. Immediately in most states, eventually in all states, the established

churches were disestablished – deprived of government sponsorship and deprived of tax support. The details varied from state to state, but disestablishment was not the work of secular revolutionaries. It was mostly the work of evangelical religious dissenters." Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 Ind. J. Global Legal Stud. 503, 508 (2006).

James Madison wrote his "Memorial and Remonstrance Against Religious Assessments" to oppose Patrick Henry's bill that would have required Virginians to designate a portion of their civil tax for the support of clergy, "*or the providing places of divine worship*, and to none other use whatsoever." "A Bill Establishing a Provision for Teachers of the Christian Religion," *reprinted in* Flowers, *Religious Freedom and the Supreme Court* at 1130 (emphasis added). In the *Memorial*, Madison echoed many of the concerns of the religious dissenters, including "that it would coerce a form of religious devotion in violation of conscience,"[5] "that a true religion did not need the support of law,"[6] and that permitting religious institutions to compete with one another for scarce public resources would "destroy that moderation and harmony which the

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[5] *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011)

[6] *Everson v. Bd. of Educ.*, 330 U.S. 1, 12 (1947).

forbearance of our laws to intermeddle with Religion, has produced amongst its several sects.'"[7]

"In Madison's view, government should not 'force a citizen to contribute three pence only of his property for the support of any one establishment'" – a principle that "does not depend on the amount of property conscripted for sectarian ends. Any such taking, even one amounting to 'three pence only,' violates conscience." *Winn*, 563 U.S. at 141 (quoting *Flast v. Cohen*, 392 U.S. 83, 103 (quoting 2 Writings of James Madison 183, 186 (G. Hunt ed. 1901))).

Madison's and the dissenters' objections carried the day: Henry's bill was defeated, and the Virginia General Assembly instead enacted Thomas Jefferson's "Bill for Establishing Religious Freedom," which in its very text repeated not only Madison's admonitions about protecting private conscience, but also his idea that state support for religion "tends also to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it."[8] The enacted Virginia bill

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[7] James Madison, *Memorial and Remonstrance* para. 11, quoted in *Everson*, 330 U.S. at 69 (Appendix to dissenting opinion of Rutledge, J.).

[8] "A Bill for Establishing Religious Freedom," *reprinted in* 2 Papers of Thomas Jefferson 546 (J. Boyd ed. 1950); *see also Everson*, 330 U.S. at 53 (Rutledge, J., dissenting) ("The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting.").

thus included a provision that became the template for so many state constitutional provisions, including Missouri's: "[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." "A Bill for Establishing Religious Freedom," *reprinted in* 2 Papers of Thomas Jefferson 546 (J. Boyd ed. 1950); *see also Locke*, 540 U.S. at 722 n.6 (quoting this provision).

Professor Laycock has thus well summarized the fight over disestablishment: "The dominant issue in the founding-era debate over disestablishment was government financial support for churches. Churches that received tax support did not want to give it up; many citizens, and especially dissenters and the unchurched, did not want to pay the taxes. Defenders of the established churches proposed as a compromise that dissenters be allowed to pay their church tax to their own church, so that tax money would be equally available to all denominations. But in the end, every state rejected this compromise. The high profile debate over tax support for churches has played a large role in the development of American understandings of religious liberty." Laycock, *Church and State* 13 Ind. J. Global Legal Stud. at 508.

Whatever disputes exist about the historical meaning of no establishment, there is little question that avoiding tax support for churches was a central concern of the Founding era. Whether modern Establishment Clause jurisprudence *might* allow a state to include a church in a particular secular grant program with appropriate safeguards to prevent government

funding of religious activity, it is not surprising that Missouri or any other state would, as a matter of state policy, choose not to fund churches.

B. Churches are quintessential religious entities accorded special legal status to protect their autonomy and religious liberty.

The unique place that churches occupy in law is not simply a relic of history. Their legal status reflects their distinctive nature. The primary purpose of identifying as a church is to claim a religious identity and purpose, and to engage in religious activities with others.

Churches are the historic and typical vehicle for communal religious activities, including assembling for worship, religious education, and proselytization. Every week, millions of Americans voluntarily attend a house of worship, funded with the tithes and offerings of voluntary adherents of the faith. The manner in which a church expresses itself through doctrine, tradition, practice, use of its facilities, and involvement in activities that benefit those outside the faith community, varies widely.[9] These differences reflect our

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[9] Declining to tie a church's tax exemption to the extent it serves the larger community, this Court described this diversity in church practices in *Walz*, 397 U.S. at 674: "Churches vary substantially in the scope of such services. . . . The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce

country's religious liberty and diversity and the autonomy provided to churches by the Religion Clauses.[10]

Church-owned and operated facilities are not readily segregated between religious use and secular use devoid of religious import.[11] It is common for

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an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize."

[10] This Court recently affirmed the broad autonomy of churches to include a "ministerial exception" to most employment laws in *Hosanna-Tabor*. The Court stated, "Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." *Hosanna-Tabor*, 132 S. Ct. at 702. This deference to churches was not to protect invidious discrimination but to recognize the full legal freedom in employment of ministers as central to the faith and mission of the church itself. *Id.* at 707.

[11] Church facilities are in fact recognized in federal law as deserving of special treatment. In describing the need for the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-5 (2012), the joint statement of Senator Orrin Hatch and Senator Edward Kennedy asserted, "The right to assemble for worship is at the very core of the free exercise of religion. Churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes." 146 Cong. Rec. S7774 (daily ed., July 27, 2000) (joint statement Sen. Hatch and Sen. Kennedy). Additionally, Congress had previously enhanced the penalties for vandalizing or destroying religious real property in the Church Arson Prevention Act of 1996. 18 U.S.C. § 247 (2012). In 2011, a Texas man pled guilty to charges pursuant to this act for "setting fire to a playground outside of a mosque." "Texas Man Pleads Guilty in Arson of Mosque Playground" *Religious Freedom*

churches to have facilities dedicated to the care and education of children to facilitate worship for their parents. It is also common that such facilities are used as additional ministry opportunities beyond Sunday services. The extent to which such a church ministry is funded from the church offerings or through tuition payments that may produce income for other church activities and the extent to which the ministry is explicitly religious is a matter of church autonomy.

In this case, Petitioner is a church that uses its facilities to operate a ministry for the children of church members, as well as other children in the community, to teach a Christian worldview and spread the Gospel of Jesus Christ. *See* Complaint ¶¶ 14-17. As the district court held, "religious instruction is a central element of the preschool and daycare offered through the Learning Center, and there is nothing in the Complaint to suggest that this instruction does not extend to the playground." *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 976 F. Supp. 2d 1137, 1150 (W.D. Mo. 2013). It would be difficult, if not impossible, to provide government funding for church property with adequate safeguards to insulate that aid from religious use.

Petitioner argues it should be eligible for a grant because the State's program is secular and because the aid is for material that cannot be diverted to religious

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in Focus 45 U.S. Dep't of Just. C.R. Div. (2011), https://www.justice.gov/crt/religious-freedom-focus-volume-45#4.

use. While it is true that scrap material is not inherently religious, that fact does not defeat the State's interest or otherwise control the outcome of this case. Many secular objects, such as bread, wine, and water, take on religious significance in the context of a church. Under Petitioner's theory, however, there would not even be an Establishment Clause question if a state decided to fund construction of houses of worship, because building materials are not inherently religious. The issue is not whether the recycled rubber replacement material is inherently religious, but whether Missouri must fund an upgrade to a church playground, with the accompanying federal constitutional responsibility to provide safeguards against state funding of religion.[12]

This Court in *Amos* recognized the threat to church autonomy posed by judicial attempts to distinguish a church's religious from its secular activities. "[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987). For that reason, the

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[12] *See infra* Section I.C.

Amos court upheld the exemption for religious employers from Title VII's religious discrimination provision, and rejected a plea to constitutionally require a narrower, job-by-job analysis in place of that bright-line exemption. *Id.* at 344 ("A case-by-case analysis for all activities . . . would both produce excessive government entanglement with religion and create the danger of chilling religious activity.") (Brennan, J., concurring).

Here, the same reasoning applies and is even more compelling. The religious employer in *Amos* was a gymnasium with a religious affiliation. Trinity Lutheran is a house of worship, the quintessential pervasively religious institution. If a case-by-case analysis of a religiously affiliated gymnasium produces excessive government entanglement, then surely such scrutiny of houses of worship raises even greater establishment concerns. Distinguishing a church's religious facilities from its non-religious facilities to determine their eligibility for taxpayer funds entangles state funding agencies inappropriately in religious matters, and compromises a church's autonomy. Given those dangers to religious liberty, Missouri should not be faulted for implementing a bright-line rule that ensures complete financial separation. The grant program, if applied to Petitioner, would pay for improvements to church property used to advance the church's ministry. Surely the State is not required to provide such funding.

C. This Court's Establishment Clause jurisprudence recognizes the unique status of churches and the special dangers associated with government funding of churches.

This Court has never upheld a direct grant to churches, much less *required* the State to provide such funding. The Eighth Circuit was far too quick to assume that Missouri's scrap tire grant program, if extended to churches, would satisfy the Federal Establishment Clause. In the Court's most recent case involving direct aid to religious institutions, *Mitchell v. Helms*, 530 U.S. 793 (2000), Justice O'Connor's controlling opinion warns of "the special dangers associated with direct money grants to religious institutions." *Id.* at 855 (O'Connor, J., joined by Breyer, J., concurring) (upholding program of in-kind aid to religious schools, among others, because it contained constitutionally adequate safeguards against diversion to religious use).[13] Direct money grants, she notes, is a "form of aid [that] falls precariously close to the original object of the Establishment Clause's prohibition." *Id.* at 856. *See also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 842, 844 (1995) ("we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian

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[13] Because no opinion in *Mitchell* commanded a majority, the concurring opinion of Justices O'Connor and Breyer is controlling, because it is the narrowest opinion in support of the Court's results. *Marks v. United States*, 430 U.S. 188, 193 (1977). *Mitchell* involved provision of in-kind aid to schools, including religiously affiliated schools, *not* funding for houses of worship.

institutions. . . . It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse.").

This Court has treated churches, and other pervasively religious entities, with special sensitivity. Whether constitutionally mandated or simply permissive, such treatment aligns with the free exercise and no establishment values embodied in the First Amendment. Religious institutions, and churches in particular, have long been recognized as vehicles for religious expression and practice with autonomy interests protected by the Religion Clauses. These entities receive legal advantages, such as exemptions from certain employment laws to facilitate free exercise, to protect against government interference with religious practice. Likewise, religious institutions may be subject to exclusions from government funding, in part because religion so pervades their purpose and functions that any government aid risks government financing of religious experience.[14]

Importantly, the Establishment Clause concern that lurks in this case is unlike that in one involving indirect financing by "vouchers," where the Court may find the funding of religious institutions is permissible only as a result of genuinely independent private choice, *see Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *see also Locke*, 540 U.S. at 719 (explaining that,

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[14] That the plurality opinion in *Mitchell v. Helms* raised questions about the "pervasively sectarian entities" category should not interfere with the scope of state discretion to steer clear of aiding houses of worship, the prototypical sectarian entity.

for this reason, the scholarship program at issue there would not violate the Establishment Clause). Likewise, this case does not involve a question of access to a speech forum open to a wide array of viewpoints. *See Rosenberger*, 515 U.S. 819; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Widmar v. Vincent*, 454 U.S. 263 (1981) (requiring equal treatment); *Locke*, 540 U.S. at 720 n.3 (challenged funding program "is not a forum for speech"). Similarly, this Court's decisions allowing aid to religious institutions in other contexts, such as social services, do not undercut the state's interest of not funding religious activities or certain religious institutions that do not separate their religious and secular activities. *See Bowen v. Kendrick*, 487 U.S. 589, 621 (1988) (remanding case involving funding of social services provided by religious organizations to ensure no aid to pervasively sectarian entities or distinctively religious activities).

Nor does the aid in question resemble police and fire protection, which is not only *not* a form of direct *monetary* aid, but is also an entitlement for *everyone* in the community. *See Everson*, 330 U.S. at 17-18. Here, Missouri state administrators, not private parties, make decisions about the provision of *cash subsidies* to a select and very limited group of recipients – only fourteen entities in the year in question, out of the forty-four that applied. In this regard, the instant case is even stronger for the state than in *Locke*, where the state excluded students majoring in devotional theology from the Promise Scholarship Program, which was available to every student who otherwise met the

grade and income requirements. The program was not a lottery to which qualifying students would apply and hope to win a scholarship. Missouri's narrow incentive program for a small number of recipients reflects its funding priorities and is consistent with its long-standing religious liberty policy. Because the Missouri program is highly limited and discretionary, the state's constitutional defense of it is even easier than was the case in *Locke*.

This Court need not and should not opine on whether and under what rare circumstances and conditions the Establishment Clause might allow a state to convey funds directly to a church. Even assuming arguendo that this grant program satisfied the Establishment Clause, Missouri does not violate the Constitution by implementing its own reasonable, bright-line rule, incorporated in three long-standing provisions of the Missouri Constitution – likewise found in the constitutions of most of the states in the Union – that the state may not make direct payments to a church. If the Court holds that Missouri *may* continue to implement this categorical, bright-line rule, there will be no need to decide what safeguards are necessary to satisfy the Establishment Clause.

II. MISSOURI'S CONSTITUTIONAL PROHIBITION ON DIRECT FUNDING OF CHURCHES PROTECTS RELIGIOUS LIBERTY AND CANNOT BE DISMISSED AS RELIGIOUS STATUS DISCRIMINATION

Missouri's bright-line rule prohibiting the direct funding of churches is well-founded and within the State's discretion to separate the institutions of government and religion beyond what the Establishment Clause requires.

A. Federalism allows states to maintain an independence of religion and government beyond what the Establishment Clause requires.

In our federalist system, federal and state laws sometimes provide overlapping protections. While states cannot offer less protection than the federal government, they can, and often do, offer greater protection. *See, e.g.*, *State v. Schmid*, 423 A.2d 615, 626 (N.J. 1980) (noting that the New Jersey state constitutional free speech and assembly protections are "more sweeping in scope than the language of the First Amendment"; *People v. Scott*, 593 N.E.2d 1328, 1334 (N.Y. 1992) ("We believe that under the law of this State the citizens are entitled to more protection [than the Fourth Amendment provides]."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948-49 (Mass. 2003) ("The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection

for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.").

As Chief Justice Rehnquist's majority opinion in *Locke* demonstrates, that understanding of constitutional protections – as a floor beneath and not a ceiling above constitutional concerns – applies with full force in the Establishment Clause context. *See Locke*, 540 U.S. at 722 ("the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution."). The desire to avoid establishment, the Court reasoned, is a "historic and substantial state interest." *Id.* at 721. Because the Establishment Clause is restrained by the Free Exercise Clause, and vice versa, potential expansion of each above the floor of federal rights is inherently and uniquely limited. The "pairing presents a constitutional strategy that appears nowhere else in the Bill of Rights. . . . [They] create both a floor under and a ceiling over the formulation of religion policy by the states." Ira C. Lupu and Robert Tuttle, *Federalism and Faith*, 56 Emory L.J. 19, 21-22 (2006).

This Court has recognized that there is room for state policy between what the Establishment Clause prohibits and the Free Exercise Clause demands. *Walz*, 397 U.S. at 669. Though certainly not without limits, this "play in the joints" allows states to pursue religious liberty interests beyond what is required by the First Amendment. *Id.* Otherwise, every state decision touching religious institutions would raise a controlling federal constitutional question. Just as there is a

zone of permissive accommodation that the government may respect beyond what the Free Exercise Clause requires, there is a zone of permissive separation to maintain the independence of religion and government beyond what the Establishment Clause requires.

By affording state and local governments the latitude to resolve church-state issues between the Religion Clauses, "federal courts achieve some of the desirable effects of originalism – namely political accountability and judicial consistency." Jesse R. Merriam, *Finding a Ceiling in a Circular Room:* Locke v. Davey, *Religious Neutrality, and Federalism*, 16 Temp. Pol. & C.R. L. Rev. 103, 129 (2007). Refusing states this latitude on borderline church-state issues would collapse the "play in the joints" between the Religion Clauses this Court has wisely and repeatedly recognized. *Locke*, 540 U.S. at 718 (quoting *Walz*, 397 U.S. at 669).

B. Missouri's historic and consistent policy is well founded and cannot be dismissed as religious status discrimination.

Missouri's distinct legal treatment of churches provides no basis for constitutional suspicion or charges of religious animus. Missouri and more than half of the states have long-standing constitutional provisions that recognize the unique nature of religious institutions, protect against state funding of religious experience, and explicitly prohibit the funding

of churches. Petitioner's claim that the Constitution requires direct funding of church facilities would upend church-state law and could have far-reaching negative consequences for religious liberty.

Long before U.S. Senator James Blaine introduced his constitutional amendment to prohibit government funding of sectarian schools in order to support public education, the question of taxes collected by the government being given directly to churches had been settled. "[T]here were widespread objections to tax support for churches. . . . This opposition forced the Framers' generation to think about the tax issue. Once they thought about it, they concluded that any form of tax support for churches violated religious liberty." Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim about Original Intent*, 27 Wm. & Mary L. Rev. 875, 917 (1986).

Whatever disputes exist about the historical meaning of no establishment, there is little question that avoiding tax support for churches was a central concern of the Founding era. Whether modern Establishment Clause jurisprudence *might* allow a state to include a church in a secular in-kind grant program with appropriate safeguards to prevent government funding of religion,[15] it is not surprising that Missouri or any other state would choose not to fund churches.

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[15] *See supra* Section I.C. discussing *Mitchell v. Helms*.

Missouri's constitutional history provides strong support for the "no-aid" principle as an essential religious liberty protection. It is utterly ahistorical and anti-originalist to re-frame that principle as harmful or hostile to religion. The state constitution includes three provisions that categorically prohibit the State from providing money to churches directly: article I, sections 6 and 7, and article IX, section 8.[16] These constitutional provisions have a long and distinguished history, spanning almost two centuries and several different iterations of the state constitution.[17] They are

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[16] Mo. Const. art. I, § 6: "That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same." Mo. Const. art. I, § 7: "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." Mo. Const. art. IX, § 8: "Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever."

[17] All four Missouri constitutions have had one or more no-aid provisions. Once introduced, the provisions remained in each

consistent with similar categorical prohibitions in the constitutions of at least thirty-nine of the fifty states of the Union.[18] These bright-line, prophylactic rules

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successive constitution without material change. Article I, section six's "no compel" provision was first introduced as article XIII, section 4 of the 1820 constitution. 4 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 2163, 2192, 2230 (Francis Newton Thorpe ed., 1909) (hereinafter "Thorpe"). Article IX, section 8 first appeared in a series of amendments to the 1865 constitution which were ratified on November 8, 1870. 4 Thorpe at 2228, 2264. This provision strengthened Missouri's no-aid commitment by specifying that state and local government bodies would not "make any appropriation, or pay, from any public fund whatever, anything in aid of any creed, church, or sectarian purpose." *Id.* at 2228. Article I, section 7 first appeared as article II, section 7 of the 1875 constitution specifying that public funds will not be paid directly or indirectly to "any church, sect, or denomination of religion." 4 Thorpe at 2230.

[18] Thirty-nine states have one or more constitutional provisions effectively prohibiting direct payments to churches. Thirteen states, including Missouri, have *both* a provision providing that "no man shall be compelled to support a church," or words to that effect, *and* one or more provisions saying "no money shall be spent on churches," or words to that effect: Colorado, Idaho, Illinois, Indiana, Michigan, Minnesota, Missouri, New Mexico, Pennsylvania, South Dakota, Texas, Virginia, and Wisconsin. Fourteen states have only the former "no man compelled" but not the latter: Alabama, Arkansas, Connecticut, Delaware, Iowa, Kentucky, Maryland, Nebraska, New Jersey, Ohio, Rhode Island, Tennessee, Vermont, and West Virginia. Twelve states have only the latter ("no funds"), but not the former: Arizona, California, Florida, Georgia, Massachusetts, Montana, New Hampshire, Oklahoma, Oregon, Utah, Washington, and Wyoming. *See* Appendix for the text of each of these constitutional provisions. Eleven states have no such provision regarding financial support for churches or places of worship: Alaska, Hawaii, Kansas, Louisiana, Maine, Mississippi,

reflect fundamental concerns – about protecting taxpayer conscience, preserving church autonomy, and avoiding religious conflict in the legislative and administrative process – that animated Madison's *Memorial and Remonstrance*, the 1779 enactment of the Virginia "Bill for Establishing Religious Freedom," and the Establishment Clause of the Federal Constitution, which Madison himself drafted. A decision by this Court requiring Missouri to directly fund churches, despite its long constitutional tradition to the contrary, would unsettle the state constitutional law of every state that has a comparable funding prohibition.

When Missouri entered the union as a state, in 1821, its first constitution provided that "no man can be compelled to erect, support or attend any place of worship, or to maintain any minister of the gospel, or teacher of religion."[19] By including this provision,

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Nevada, New York, North Carolina, North Dakota, and South Carolina.

[19] Mo. Const. of 1820 art. XIII, § 4, quoted in 4 Thorpe 2163. The provision read in full: "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can be compelled to erect, support or attend any place of worship, or to maintain any minister of the gospel or teacher of religion; that no human authority can control or interfere with the rights of conscience; that no person can ever be hurt, molested or restrained in his religious professions or sentiments, if he do not disturb others in their religious worship." Congress required Missouri to make an amendment to its 1820 Constitution as a condition of entry into the union, *id.* at 2148-49, but did not insist upon any such change to the religion clauses.

Missouri was not breaking new ground. A similar prohibition appeared in Virginia's landmark "Bill for Establishing Religious Freedom" in 1779, and at least thirteen of the twenty-three states that preceded Missouri into the Union included such a prohibition in their constitutions.[20] This provision, guaranteeing that no one will be compelled to support *any place of worship*, has been a part of Missouri's Constitution ever since, without material change; it appears today as article I, section 6.

From its first articulation of its own no establishment interests, Missouri protected the religious liberty of its citizens by refusing to fund both church buildings (erect or support) and church leaders or teachers (maintain). Through each successive iteration approved by Missourians, the state constitution maintained its prohibition against funding churches including in the current version, enacted in 1945, with three reinforcing no-aid provisions.

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[20] *See* Ala. Const. of 1819, art. I, § 3, quoted in 1 Thorpe at 97; Conn. Const. of 1818, art. VII, § 1, quoted in 1 Thorpe at 544-45; Del. Const. of 1792, art. I, § 1, quoted in 1 Thorpe at 568; Ga. Const. of 1798, art. IV, § 10, quoted in 2 Thorpe at 800-01; Ill. Const. of 1818, art. VIII, sec. 3, quoted in 2 Thorpe at 981; Ind. Const. of 1816, art. I, § 3, quoted in 2 Thorpe at 1058; Ky. Const. of 1792, art. XII, § 3, quoted in 3 Thorpe at 1274; N.J. Const. of 1776, art. XVIII, quoted in 5 Thorpe at 2597; N.C. Const. of 1776, art. XXXIV, quoted in 5 Thorpe at 2793; Ohio Const. of 1802, art. VIII, § 3, quoted in 5 Thorpe at 2910; Pa. Const. of 1776, art. II, quoted in 5 Thorpe at 3082; Tenn. Const. of 1796, art. XI, § 3, quoted in 6 Thorpe at 3422; Vt. Const. of 1793, ch. I, art. III, quoted in 6 Thorpe at 3762.

Missouri state courts have consistently interpreted these no-aid clauses together as a series of constitutional provisions designed to advance "the principle which is of the warp and woof of democracy, namely, [that] the people must enjoy religious freedom and religious equality," a principle that "has stood out as a guiding star in the growth and development of our form of government and has contributed to its solidarity. . . . Because of it, devotion to religious beliefs according to the dictates only of one's conscience without molestation or forcible direction became possible, thus permitting an unhampered growth of religious conviction of any sort and of every denomination."[21] Notably, these no-aid provisions cannot be dismissed as simply prohibiting preferential funding of churches. A separate "no preference" provision introduced in the 1865

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[21] *Harfst v. Hoegen*, 163 S.W.2d 609, 611-12 (Mo. 1942). *Harfst* was a case involving the funding of religious schools, rather than churches. The Missouri Supreme Court held that the state constitution forbade such funding *despite* the acknowledged significant secular value of the education offered in such schools: "[W]e recognize that the members of these noble teaching orders are inspired only by the most unselfish and highest motives; that parochial education is an embodiment of one of the highest ideals that man may enjoy. The Supreme Court of the United States found that parochial education has been 'long regarded as useful and meritorious.' In the instant case it is admitted by all parties that the Sisters are fully qualified according to the standards set by the superintendent of instruction as teachers of a public school. We know of the great educational institutions conducted by the Jesuits and other Catholic Orders and of their high standards of excellence, St. Louis University being a leader among them." *Harfst*, 163 S.W.2d at 614 (quoting *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925)).

Constitution states: "No preference can ever be given, by law, to any church, sect, or mode of worship."[22]

Neither state history nor the consistent interpretation of these no-aid clauses support the argument that these provisions were the product of any anti-Catholic animus. The no-funding rule was a well-established part of Missouri's constitution – and of the constitutions of many other states – years before Senator Blaine proposed his (unenacted) federal constitutional amendment. Moreover, the no-funding rule has always applied to foreclose direct subsidies to *all* of the churches in Missouri, most of which were (and are) attended by non-Catholic Missourians. Missouri's three constitutional no-aid clauses complement one another, distinctly covering aid to churches separate and apart from aid to religious schools or to clergy.

C. Missouri's implementation of its grant program, consistent with its constitutional ban on direct funding of churches, is a valid exercise of federalism well within a narrow reading of *Locke v. Davey*.

Missouri has implemented a competitive grant program to reimburse a few "qualifying organizations for the purchase of recycled tires to resurface playgrounds, a beneficial reuse of this solid waste." *Trinity*

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[22] Mo. Const. of 1865 art. I, § 11, quoted in 4 Thorpe 2192. This no preference provision remains in the current constitution within article I, section 7.

Lutheran, 788 F.3d at 779. Pursuant to the no-aid provisions in the state constitution, a departmental policy prohibits organizations owned or controlled by a church from participating in the program. The prohibition prevents the state from becoming entangled in religion. It avoids the state having to decide or verify what part of a church's facilities are sufficiently secular and distinct from its religious core or explicit religious activities to qualify for government funding. This policy fits squarely within the zone of permissive separation prohibiting the State from financing a church's capital improvement project. If the provision were not in place, the Federal Establishment Clause would, at a minimum, require Missouri to design the program to include safeguards against state funding of religious activity,[23] thus increasing the opportunity for regulatory interference with how a church wants to use its property to advance its mission. The State is entitled to avoid that kind of entanglement with religion.

As the Eighth Circuit held, Missouri's interest in not funding churches is just as historic and substantial as a state's interest in not funding ministerial training. Petitioner's attempts to reduce *Locke*'s precedential value to the context of such training while creating a federal mandate for state grant programs to include funding for church facilities, should be explicitly

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[23] *Mitchell*, 530 U.S. at 860-67 (upholding program of in-kind aid to religious schools, among others, because it contained constitutionally adequate safeguards against diversion to religious use) (O'Connor, J., joined by Breyer, J., concurring).

rejected. Whether the asserted secular interest is funding higher education or safer playgrounds, the State is entitled to maintain and implement prophylactic rules to avoid funding religion or becoming entangled in it. Petitioner's focus on the scrap material as inherently secular ignores the unique qualities of churches, and Missouri's substantial interest in not funding them.

In *Locke*, this Court upheld a substantially similar state constitutional provision as fitting within federalism's zone of permissive separation, even though the Court recognized that Washington's program would not violate the Federal Establishment Clause. The Court recognized that the Promise Scholarship Program was a voucher program where the "link between government funds and religious training is broken by the independent and private choice of recipients." *Locke*, 540 U.S. at 719. Missouri's scrap tire grant program involves direct funding, thereby more sharply implicating the State's interest in avoiding the funding of religion in a context in which federal constitutional limits may be uncertain. This too makes the instant case even easier than *Locke* for the state to justify its funding limitation.

Petitioner's attempt to cast Missouri's more explicit ban on state funding of religion as unconstitutional discrimination and to limit Chief Justice Rehnquist's opinion in *Locke*, are deeply unpersuasive. Many of the cases relied upon by Petitioner – particularly *McDaniel v. Paty*, 435 U.S. 618 (1978) and *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993) – were properly distinguished in *Locke* as involving

coercive limitations on religious freedom. These decisions provide even less support for Petitioner's claim than they did for that of Joshua Davey. This Court's decision in *Locke* firmly supports Missouri's denial of a direct grant to a church to improve its property.

As Chief Justice Rehnquist wrote for the Court in *Locke*, "[T]he State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. . . . The State has merely chosen not to fund a distinct category of instruction." *Id.* at 720-21 (citations omitted). In this case, Missouri certainly does not prevent the Trinity Lutheran Church from building, improving, or operating its facilities consistent with its religious calling. Nor does it prevent the Church from having a playground or a preschool, and operating them consistently with its ministry priorities and community outreach efforts. Missouri is simply refusing to fund a capital improvement project for the Church, consistent with its three bright-line constitutional provisions, which are similar to provisions found in most other states' constitutions as well. It would profoundly upend our constitutional history, state and federal, to require Missouri to fund the improvement of church property.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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RECORD AND BRIEFS

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In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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Blumberg

QUESTION PRESENTED

Whether conditioning government benefits on religious status violates the First Amendment when the state has no valid Establishment Clause concern.

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INTEREST OF THE *AMICUS*[*]

The Becket Fund for Religious Liberty is a nonprofit, public-interest law firm dedicated to protecting the free expression of all religious faiths. It is founded on a simple but crucial principle: that religious freedom is a fundamental human right rooted in the dignity of every human person. To vindicate this principle, the Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, Zoroastrians, and many others in lawsuits across the country and around the world.

This case cuts to the heart of the Becket Fund's mission because it involves a decision by the State of Missouri to single out religious groups for disfavored treatment based solely on their religious status. That decision not only marginalizes and stigmatizes religious groups, but also, if allowed to stand, would threaten their access to a wide variety of important public benefits. This Court should reaffirm the basic principle that the First Amendment requires government neutrality toward religion.

SUMMARY OF THE ARGUMENT

A scraped knee is a scraped knee whether it happens at a Montessori daycare or a Lutheran daycare. But according to the State of Missouri, officers expending public funds have to check whether the playground's owner has a religious affiliation before supplying a protective surface. That is because Missouri

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[*] No party's counsel authored any part of this brief. No person other than the *amicus curiae* contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief. Petitioner provided a notice of blanket consent to the Court; Respondent provided *amicus* with written consent.

has interpreted its constitution to banish religious groups from all government aid programs. Missouri's categorical exclusion of otherwise eligible organizations from a generally available public benefit serving wholly secular needs, merely because of their religious affiliation, violates the First Amendment.

The First Amendment's command of neutrality prevents the government from "impos[ing] special disabilities on the basis of religious views or religious status," *Emp't Div.* v. *Smith*, 494 U.S. 872, 877 (1990) (citing *McDaniel* v. *Paty*, 435 U.S. 618 (1978)), and requires that "a law not discriminate on its face," *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993). Missouri's scrap tire program does both: on its face, it denies religious organizations access to a public safety benefit, and it does so based solely on their religious status.

This Court's decision in *Locke* v. *Davey*, 540 U.S. 712 (2004), provides no support for Missouri's program. *Locke* upheld a state's decision not to fund degrees in devotional theology. It did not say that states can exclude otherwise qualified individuals from a generally available benefit based solely on their religious status. The Court in *Locke* also suggested that the denial of funding there advanced a historic and substantial antiestablishment interest. But here, the supposed antiestablishment interest is nil. The scrap tire program simply reduces waste and makes playgrounds safer; it provides "secular and nonideological services unrelated to the primary, religion-oriented function of the sectarian school," and thus would have survived scrutiny even under the strictest strictures of the "no aid" period in this Court's jurisprudence. *Meek* v. *Pittenger*, 421 U.S. 349, 364 (1975), overruled by

Mitchell v. *Helms*, 530 U.S. 793 (2000). *See also Grand Rapids Sch. Dist.* v. *Ball*, 473 U.S. 373, 385 (1985), overruled by *Agostini* v. *Felton*, 521 U.S. 203 (1997) (permitting aid that does not "intentionally or inadvertently inculcat[e] particular religious tenets"). And under the Court's modern Establishment Clause decisions, including churches in the program would be no problem because it would simply make tires "available to both religious and secular beneficiaries on a nondiscriminatory basis" under "neutral, secular criteria that neither favor nor disfavor religion." *Agostini*, 521 U.S. at 231.

Because Missouri has singled out religious organizations for the denial of public benefits based solely on their religious status, and because it has no legitimate antiestablishment basis for doing so, its scrap tire program violates the First Amendment's basic command of neutrality.

ARGUMENT

I. The scrap tire program violates the First Amendment by conditioning government benefits on religious status.

The Free Exercise and Establishment Clauses are not in conflict. They are complementary. They must "be read together * * * in light of the single end which they are designed to serve"—namely, "[t]he fullest realization of true religious liberty." *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring). The two parts of the Religion Clause "speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not to affect one's legal rights or duties or benefits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S.

687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment). By conditioning eligibility for scrap tire grants on religious status, Missouri has violated the basic First Amendment requirement of neutrality, which forbids the government from "either encourag[ing] or discourag[ing] religious belief or * * * practice." Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990). Missouri's exclusion of religious entities is the clearest possible example of an unconstitutional penalty on the exercise of a constitutional right.

A. The scrap tire program violates the basic requirement of neutrality.

Missouri's scrap tire program violates the basic principle of neutrality by singling out religious organizations for disfavored treatment based solely on their religious status. The Court recognized this principle in its very first decision applying the Establishment Clause to the states, explaining that the government may not exclude "Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16 (1947).

Some thirty years later, in *McDaniel* v. *Paty*, 435 U.S. 618 (1978), the Court ruled that the Free Exercise Clause prohibits the government from excluding individuals, based on their religious status, from public rights or opportunities otherwise generally available to all. There, the Court struck down a provision of the 1796 Tennessee Constitution and a related statute, which prohibited any "minister of the gospel" from

serving in the state legislature or becoming a delegate to the state's constitutional convention. *Id.* at 621 n.1. As Chief Justice Burger explained for the plurality: "[U]nder the clergy-disqualification provision, McDaniel cannot exercise both [the right to be a minister and the right to hold office] simultaneously because the State has conditioned the exercise of one on the surrender of the other." *Id.* at 626. To "condition the availability of benefits" upon McDaniel's "*status* as a 'minister'" impermissibly "penalizes the free exercise of [his] constitutional liberties." *Id.* at 626–27 (quoting *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963)).

The plurality explicitly rejected the argument that the clergy-disqualification provision was justified by the Establishment Clause—even though similar clergy-disqualification provisions were present in seven of the thirteen state constitutions, including Virginia, at the time of the founding. *Id.* at 622 & n.3. As the Chief Justice explained: "[T]he American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts." *Id.* at 629.

In a separate concurrence, Justices Brennan and Marshall agreed that the clergy-disqualification provision violated the Free Exercise Clause because "it establishes a religious *classification*—involvement in protected religious activity—governing the eligibility for office." *Id.* at 632 (emphasis added). In their view, this created "a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity." *Id.* Unlike the plurality, Justices Brennan and Marshall would have held that this

was a *per se* violation of the Free Exercise Clause, not subject to balancing under the Establishment Clause. *Id.* at 634–35. But they also rejected the argument that the clergy-disqualification provision was justified by the Establishment Clause: "The Establishment Clause does not license government to treat religion and those who teach or practice it, *simply by virtue of their status* as such, as subversive of American ideals and therefore subject to unique disabilities." *Id.* at 641 (emphasis added). In short, *McDaniel* establishes the basic rule that "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *Id.* at 639.

The Court reaffirmed this rule in *Employment Division* v. *Smith*, 494 U.S. 872, 877 (1990), stating that government may not "impose special disabilities on the basis of religious views or religious status," (citing *McDaniel*, 435 U.S. 618). And it expanded on the rule in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), unanimously striking down ordinances that prohibited the sacrifice of animals for religious reasons. As the Court explained, "[t]he Free Exercise Clause protects religious observers against unequal treatment." *Id.* at 542 (internal quotation marks and citation omitted). The "minimum requirement of neutrality is that a law not discriminate on its face," and "[a] law that targets religious conduct for distinctive treatment" will survive strict scrutiny "only in rare cases." *Id.* at 533, 546. In short, a consistent line of cases, from *Everson* to *McDaniel* to *Lukumi*, establishes the baseline rule that the Religion Clauses forbid laws that deny public benefits based on religious classifications or target religious conduct for distinctive treatment.

That baseline rule is controlling here. As in *McDaniel*, the scrap tire program "condition[s] the availability of benefits" on Petitioner's "status" as a church. 435 U.S. at 626. If Petitioner were to give up its religious "mission and activities" and cease to identify as a "church," it would receive a grant. Pet. Br. Addendum at 2a–3a. But instead, the state "use[s] religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *Id.* at 639. Similarly, as in *Lukumi*, the scrap tire program violates the "minimum requirement of neutrality * * * that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533. On its face, the program "impose[s] special disabilities on the basis of religious * * * status." *Smith*, 494 U.S. at 877 (citing *McDaniel*, 435 U.S. 618).

The religious status of the Trinity Lutheran daycare bears not the slightest relevance to the purpose of the state's program. Indeed, petitioner's application was ranked number five out of forty-four applications under the neutral and secular criteria of the program. The children who use this playground—not just students at Trinity Lutheran, but all the kids of the neighborhood—are just as precious as any others, and just as entitled to the protection of a civilized state. If Missouri excluded all entities with names beginning with a "T," the restriction would be struck down in a second. But this exclusion is worse than arbitrary and irrational; it burdens an enumerated constitutional right.

B. The scrap tire program is not saved by *Locke*.

Respondent offers *Locke* v. *Davey*, 540 U.S. 712 (2004), as a justification for departing from this rule. But *Locke* is inapplicable for two reasons. First, *Locke* did not involve a denial of benefits based on religious

status. The question in *Locke* was whether the state was constitutionally required to fund degrees in devotional theology, merely because it funded degrees in other programs such as history or biology. *Id.* at 719. This Court said "no," reasoning that states have the authority to choose what kinds of educational programs to fund. *Id.* at 721, 725. A state university may choose not to create a theology department—as Thomas Jefferson decided for the University of Virginia—or it may make the opposite choice. No person is treated differently on account of his religion by virtue of the state's decision not to fund a particular program of study. *Id.* at 720.

In that sense, the state's funding decision in *Locke* is parallel to a state's decision not to fund abortions, which this Court upheld in *Harris* v. *McRae*, 448 U.S. 297 (1980). A state has authority to choose what types of medical services it wishes to fund, including funding services that support childbirth but not abortion. *Id.* at 315. But it would be an unconstitutional penalty on the abortion right if a person who obtained an abortion was for that reason excluded from benefits to which she was otherwise entitled. Cf. *id.* at 317 n.19.

Here, by contrast, there is only one pertinent program—the scrap tire program—and Trinity Lutheran is excluded from the entire program solely because of its religious character. The benefits of the program are entirely conditional on the religious or nonreligious nature of the recipient. The state's decision to deny eligibility to an otherwise worthy daycare solely because of that daycare's religious identity and conduct is a classic example of an unconstitutional condition. *See, e.g.*, *Agency for Int'l Dev.* v. *All. for Open Soc'y Int'l*,

Inc., 133 S. Ct. 2321, 2330 (2013) (striking down a condition on funding that went "beyond defining the limits of the federally funded *program* to defining the *recipient*") (emphasis added); *Regan* v. *Taxation With Representation*, 461 U.S. 540, 545 (1983) (holding that "the government may not deny a benefit to a person because he exercises a constitutional right") (citing *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972)); *Perry*, 408 U.S. at 597 (stating that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited"); *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958) (explaining that "[t]o deny a[] [property tax] exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech").

Second, *Locke* is inapplicable because the Court suggested that the denial of funds in that case advanced a "historic and substantial [antiestablishment] interest" that was tied to "one of the hallmarks of an 'established' religion." 540 U.S. at 725, 722. But the antiestablishment interest in this case is nil. Shredded tires have no religious, ideological, or even instructional content. They simply make playgrounds safer. Like public bus transportation or auditory diagnosis for students at religious schools, a rubberized playground is existentially incapable of advancing religion. And the grants are available to a wide variety of recipients, the vast majority of whom are not religious.

The grants debated at the time of the founding were not part of neutral programs available to religious and nonreligious groups alike, but were grants "solely for the support of clergy in the performance of

their religious functions." Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 49 (1997). If anything, the founding-era practice of including churches in a wide variety of public benefits—from tax exemptions, to incorporation rights, to land grants, to postage subsidies, to educational funding, and more, *see Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 858–63 (1995) (Thomas, J., concurring)—strongly suggests that including religious groups in neutral public benefit programs was not viewed as an establishment. *See also Am. Atheists, Inc.* v. *City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 297 (6th Cir. 2009) (Sutton, J.) ("Reliance on the *Memorial* [*and Remonstrance* to forbid all cash reimbursements] gives historical analogy a bad name.").

Even under this Court's most stringent "no aid" decisions in the 1970s, the inclusion of churches in the scrap tire program would easily have survived scrutiny. In those cases, the Court struck down various forms of aid to religious schools, such as grants for the repair of facilities, *Comm. for Pub. Educ.* v. *Nyquist*, 413 U.S. 756 (1973); reimbursements for testing costs, *Levitt* v. *Comm. for Pub. Educ.*, 413 U.S. 472 (1973); loans of instructional materials, *Meek* v. *Pittenger*, 421 U.S. 349 (1975), overruled by *Mitchell*, 530 U.S. 793; "auxiliary services" such as remedial, therapeutic, speech, and hearing services, *id.*; transportation for field trips, *Wolman* v. *Walters*, 433 U.S. 229 (1977), overruled by *Mitchell*, 530 U.S. 793; and remedial classes taught by public school teachers, *Grand Rapids Sch. Dist.* v. *Ball*, 473 U.S. 373 (1985), overruled by *Agostini*, 521 U.S. 203, *Aguilar* v. *Felton*, 473 U.S. 402 (1985), overruled by *Agostini*, 521 U.S. 203. The basic

rationale was that these types of aid could be "intentionally or inadvertently [used to] inculcat[e] particular religious tenets," could "provid[e] a subsidy to the primary religious mission of the institutions," or could reasonably appear to do so. *Ball*, 473 U.S. at 385. But even at the apogee of its no-aid jurisprudence, the Court acknowledged that "a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities," because these are "secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school." *Meek*, 421 U.S. at 364. Shredded tires are just that. They are "secular and nonideological" services (*id.*) that simply make playgrounds safer; they do not "intentionally or inadvertently inculcat[e] particular religious tenets." *Ball*, 473 U.S. at 385.

A fortiori, including churches in the scrap tire program would be no problem under the Court's modern Establishment Clause jurisprudence. Absent the church-disqualification provision, the program would make tires "available to both religious and secular beneficiaries on a nondiscriminatory basis" and would employ "neutral, secular criteria that neither favor nor disfavor religion." *Agostini*, 521 U.S. at 231. Thus, it would create no "incentive to undertake religious indoctrination"; and even if shredded tires could somehow be used as a medium of indoctrination, that indoctrination could not be "attributed to the State." *Id.* at 230–31; *see also Mitchell*, 530 U.S. at 829–30 (plurality opinion). Nor are shredded tires capable of any meaningful diversion to religious use, *Mitchell*, 530 U.S. at 840–41, 857 (O'Connor, J., concurring in the judgment), even assuming the question of "diversion" is still relevant, compare *id.* with *id.* at 832–33 & nn.14–

17 (plurality opinion). Finally, there is no reason to suspect that the facially neutral criteria in the scrap tire program have the hidden effect of channeling aid disproportionately to religious entities. *See Zelman* v. *Simmons-Harris*, 536 U.S. 639, 707 (2002) (Souter, J., dissenting) (noting that "96.6% of current voucher money go[es] to religious schools"). Here, the vast majority of grant applicants are nonreligious. Thus, this case is more like the unanimous decision in *Witters* v. *Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986), where the benefit went to only one religious entity among many secular ones, rather than the vouchers in *Zelman*, where 96.6% went to religious schools.

Respondent may argue that the scrap tire program is different because it would involve "outright money grants" to churches. *See Mitchell*, 530 U.S. at 890–91 (Souter, J., dissenting). But this argument misapprehends the applicable doctrine. "Outright money grants" were never forbidden even at the height of no-aid separationism. Rather, direct aid was subject to the limitation that it could not be used for forms of aid that had, or could be diverted to, religious content. Just like bus rides and school lunches, government could pay the cost of rubberized play surfaces for the benefit of all children, wherever they chose to attend, even in the days of *Meek*, *Wolman*, *Aguilar*, and *Ball*.

In short, the antiestablishment interest in this case is far weaker than any possible interest in *Locke*, where there were purported historical concerns about governmental involvement in clerical theological instruction, or even in *McDaniel*, where seven of the thirteen original states had clergy-disqualification provisions. Here, the antiestablishment interest asymptotically approaches zero.

* * * * *

There are difficult cases at the outer bounds of the Religion Clauses. But this is not one of them. Missouri has singled out religious organizations for the denial of public safety benefits based solely on their religious status. It has no legitimate antiestablishment basis for doing so. Accordingly, its scrap tire program violates the First Amendment.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted.

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RECORD AND BRIEFS

No. 15-577

IN THE
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,

Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,

Respondent.

On Writ of Certiorari To The
United States Court of Appeals
For The Eighth Circuit

BRIEF FOR BELMONT ABBEY COLLEGE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Missouri may exclude religious organizations, because of their religious nature, from equal participation in entirely secular public programs without violating the Equal Protection Clause?

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INTEREST OF *AMICUS CURIAE*

Amicus Belmont Abbey College is a Catholic liberal arts college in Belmont, North Carolina.[1] It was founded in 1876 by an order of Benedictine monks who built the campus with bricks they formed by hand from the red clay of the North Carolina soil. Today, the monastery operates in the center of campus, and the monks of the Abbey continue to live on the campus of the College and sponsor it.

Religious faith is central to the identity and mission of the College, which describes itself as a "Benedictine Catholic College that finds its center in Jesus Christ. Today, as in years past and in the future, our college is inspired by St. Benedict's desire 'that in all things God may be glorified.'" The College adheres to the Apostolic Constitution *Ex Corde Ecclesiae* of Pope John Paul II, which is the Church's teaching on the role and conduct of Catholic colleges and universities.

Amicus submits this brief to ask the Court to rule that the Equal Protection Clause forbids governments from discriminating against religious organizations or individuals because of their religious identity and excluding them from equal participation in public life. Where a state's

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[1] All parties have consented to the filing of this *amicus curiae* brief pursuant to Rules 37.3 and 37.6 of the Rules of the Supreme Court. No counsel for a party authored this brief in whole or in part, and no one other than *amicus*, its members, or its counsel made any monetary contribution toward the brief's preparation or submission.

constitution relegates religious groups to an inferior status under the law—forcing them to amend the state's constitution to even participate in public programs on equal footing with non-religious groups—the state has violated the Equal Protection Clause and its actions are invalid.

INTRODUCTION AND SUMMARY OF ARGUMENT

For millions of Americans, and for hundreds of thousands of organizations those Americans have formed, religion is central to identity and self-definition. Yet the State of Missouri insists that religious organizations cannot participate in public programs on equal terms with other citizens solely because of their religious identity. Worse, Missouri enshrines this discrimination in its state constitution, thus depriving religious groups of equal rights unless and until they amend the state constitution to obtain equal status with the rest of society. That discrimination against religious groups, because they are religious, violates the Equal Protection Clause.

This Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996) provides an almost perfect parallel to this case, and to the problem of Blaine Amendments more broadly. Just like in *Romer*, the State here has singled out a particular group, based on its identity, for disfavored treatment under the law. Just like in *Romer*, the discrimination has been enshrined in the state constitution, forcing the disfavored group to suffer discriminatory treatment unless and until it is able to convince lawmakers or voters to change the

state constitution. *Romer*'s resolution is tailor-made for this case as well: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer*, at 633.

The Equal Protection Clause protects all citizens from this kind of discrimination, including religious groups. Article I, § 7 of the Missouri constitution runs afoul of this principle and is therefore invalid.

ARGUMENT

I. Article I, § 7 is Impermissible under *Romer v. Evans*

"Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that the government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer*, at 633. Accordingly, "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.*

In *Romer*, the Court held that an amendment to the Colorado state constitution ("Amendment 2") that prohibited the LGBTQ community from obtaining status as a protected class (except through further amendment of the Colorado constitution)

violated the Equal Protection Clause. In reaching this conclusion, the Court found that Amendment 2 "identifies persons by a single trait and then denies them protection across the board." *Romer*, at 633. The Court further found that Colorado's action was inconsistent with a central principle of the "Constitution's guarantee of equal protection"—*i.e.*, "that government and *each of its parts*" should remain open to all. *Id.* (emphasis added). The Court held that the Colorado amendment singles out the LGBTQ community as a class for special treatment by limiting that class, and that class only, to redressing political grievances at the state constitutional level.

In addition, the Court in *Romer* observed:

> A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "If the constitutional conception of 'equal protection of the laws means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."

Id. at 634 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)) (emphasis in original).

The Court then found that the breadth of Amendment 2 was "so far removed" from the justifications offered by Colorado—*i.e.*, the freedom of association of others and the conservation of state resources—that "it [was] impossible to credit them." *Romer*, at 635. As a result, the Court held that "Amendment 2 classifies [those who self-identify as LGBTQ] not to further a proper legislative end but to make them unequal to everyone else." *Id.* "[I]t is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.*

Article I, § 7 of the Missouri Constitution is indistinguishable in all relevant respects from the amendment that the Court found unconstitutional in *Romer*. As in *Romer*, the state constitutional provision at issue here precludes equal participation by "any church, sect or denomination of religion" or "any priest, preacher, minister or teacher thereof' in government programs. And as in *Romer*, the targeted group is restricted to seeking redress of its political grievances solely through the state constitutional process, while all other state citizens may effectuate change in public policy through laws, regulations, or administrative discretion. *See* MO. CONST. art. I, § 7. The harm that results from this classification is real and tangible. The court below found that "it now seems rather clear that Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire grant program without violating the Establishment Clause." *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 784 (8th Cir. 2015). In other words, except

for Article I, § 7, the Scrap Tire program administrator could have awarded a grant to Trinity Lutheran because Trinity Lutheran satisfied the other, neutral program criteria. But Trinity Lutheran could not participate, and could not even petition or persuade the program administrator to act on such basis. Rather, as in *Romer*, Trinity Lutheran is limited to seeking change in public policy solely through the state constitutional process.

Furthermore, there is direct evidence that Article I, § 7 was enacted out of actual animus for those with a religious identity, namely Catholics. While in *Romer* the animus was merely inferred from the state's exclusion, here, in addition to the bare fact of the religion-based exclusion, there is also historical evidence that Article I, § 7, like other Blaine Amendments, was part of a wave of anti-Catholic bigotry in the middle of the 19th century. *See* Mier Katz, *The State of Blaine: A Closer Look at the Blaine Amendments and Their Modern Application*, 12 ENGAGE 111, 111-12 (2011); Mark DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J. L. & PUB. POL'Y 551, 607-08, (2003); *see also* Pet. Br. at 42-44.

Yet, even in the absence of actual animus, Article I, § 7 could not survive the rational basis scrutiny applied in *Romer*. This is because the "breadth" of Article I, § 7 as construed by Missouri is "far removed" from the justification offered by Missouri to support it. *See Romer*, at 635. Missouri justifies Article I, § 7 on the grounds that it serves

Missouri's policy against religious establishment. But even assuming that concern is valid in some circumstances, a program to make use of recycled scrap tire is "so far removed" from any plausible danger of establishment that the concern cannot be taken seriously here. Furthermore, by interpreting Article I, § 7 to allow the state to grant "aid" to some private entities and not others—*i.e.*, not "any church, sect or denomination of religion"—Missouri creates precisely the establishment problem that it claims it seeks to avoid. Missouri places its public policy thumb on the scale in favor of "non-religion" over "religion"—no matter how the state defines those terms—thereby establishing the State's interpretation of "non-religion" as favored.

In this respect, Article I, § 7 exerts real pressure on religious groups to renounce their faith or divest themselves of enterprises like preschools. Forcing individuals and groups to give up their religious mission makes them surrender something that is "essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). Respondent has conceded that, but for Trinity Lutheran's *status* as a religious organization, it would have received a grant for playground-safety materials. *See* Pet. Br. at 6-7; Pet. App. 152a-153a; *Trinity Lutheran Church of Columbia, Inc.*, 788 F.3d at 782. Indeed, had Trinity Lutheran renounced its religious status in the grant process, then Missouri would have awarded it the grant money. Surely the government has no valid interest in forcing Trinity

Lutheran to either deny its faith or separate from its preschool.

II. This Case is Even Stronger than *Romer* Because Religion is a Suspect Class

Romer requires a ruling for petitioner even if there is no evidence of animus—simply put, state constitutions cannot exclude targeted groups from equal participation in government programs or equal ability to petition their government for better treatment. But this case is even stronger than *Romer*, both because there is evidence of animus and because religion is a suspect class.

In *Romer*, there was no direct evidence of animus. Rather, this Court inferred animus based on the petitioners' failure to proffer any independent and legitimate justification for the amendment. Here, such an inference is unnecessary because, as explained above, there is direct evidence that Article I, § 7 was motivated primarily (if not exclusively) by anti-Catholic sentiment. This evidence of *actual* animus supports petitioner's equal protection claim in this case even better than the mere inference of animus that the Court found in *Romer*.

Furthermore, it is well-established that religion is among those inherently suspect classes for which the Constitution accords the highest degree of protection. Where state action makes classifications based on suspect classes, those actions are subject to strict scrutiny. *Burlington N. R.R. Co. v. Ford*, 504

U.S. 648, 651 (1992) (laws subject to strict scrutiny are those that "classify along suspect lines like . . . religion"); *Zobel v. Williams*, 457 U.S. 55, 81 (1982) (identifying classifications based on race, religion, or alienage as "inherently suspect"); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (a law is subject to strict scrutiny under the Equal Protection Clause if it "is drawn upon inherently suspect distinctions such as . . . religion"). When Missouri precluded Trinity Lutheran's participation in the Scrap Tire Grant Program, it did so because of Trinity Lutheran's identity as a religious organization. In so doing, Missouri is using a suspect classification.

The Eighth Circuit thus erred when it applied rational basis review to Trinity Lutheran's equal protection claim simply because that claim was also accompanied by an unsuccessful First Amendment free exercise claim. The Eighth Circuit addressed this issue only in a footnote and held that, "in the absence of a valid Free Exercise claim, Trinity Church's Equal Protection Claim is governed by rational basis review." *Trinity Lutheran Church of Columbia, Inc.*, 788 F.3d at 785 n.3. To support this conclusion, the Eight Circuit relied on this Court's decision in *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004).

Locke is inapposite. In *Locke*, the religious identity of those affected by the law was not controlling. In other words, the state action in *Locke* did not purport to classify persons based on their religious *status*. Rather, the law at issue in *Locke* denied state-funded post-secondary school scholarships based on a particular type of activity,

namely seeking degrees in the field of theology. In that case, a religious person could obtain funds to pursue any other degree, such as a physics degree, on the same basis as one who is not religious. Likewise, individuals who were not religious were precluded from using the scholarship funds for the purpose of pursuing theological degrees just like those who were religious by identity. In short, in *Locke*, the law classified the type of degree that could be the subject of the scholarship. It did not classify the citizens who were eligible to receive scholarships on the basis of their religious status. Because the law at issue in *Locke* did not classify citizens by status (or at all, for that matter), the plaintiff's Equal Protection claim was bound up with his First Amendment claims. And in the absence of a valid First Amendment free exercise claim in such circumstances, the rational basis standard of review was permissible under *Romer*. *See Romer*, at 631 ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification as long as it bears a rational relation to some legitimate end.").

By contrast, here, the Missouri action indisputably classifies *religious persons and organizations* on the basis of their religious *status*. Those who are not religious by identity are permitted to receive playground-safety-related funds. Those who are religious by identity are not. This type of status-based distinction raises an equal protection issue that is independent of any First Amendment free exercise issue that also might or might not arise. *See Id.* at 633 ("A law declaring that in general it shall be more difficult for one group of citizens than for all

others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

Moreover, the distinction between the type of state action at issue in *Locke* and that at issue in this case is critical. There is simply no plausible chance that recycled scrap tires are the path to establishing religion in any way that is akin to training ministers. And scholarship recipients in *Locke* did not experience the same government pressure to change or deny their identity to participate in the program. Self-identifying as an atheist or agnostic would not have gotten the plaintiff in *Locke* a scholarship to study theology. Self-identifying as a non-church would have gotten the petitioner scrap tires here.

Because Missouri's conduct classifies persons based on their religious status, and because such classifications are deemed targeted at a suspect class, the case here is even stronger than *Romer*.

CONCLUSION

More than a century ago, the Court reiterated a fundamental tenet of the Equal Protection Clause, namely that "no . . . class of persons shall be denied the same protection of the laws which is enjoyed by . . . other classes." *Missouri v. Lewis*, 101 U.S. 22, 31 (1880). This Court applied that same principle in *Romer* twenty years ago to invalidate a state constitutional provision that placed a special disability on a single class in relation to the political process. That holding controls in this case, and it

means that states are not permitted to exclude religious organizations from equal participation in secular government programs or equal ability to petition the government. For the foregoing reasons, *Amicus* respectfully requests that this Court reverse the decision of the Eighth Circuit.

Respectfully submitted,

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No. 15-577

In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
PETITIONER

v.

SARA PARKER PAULEY, DIRECTOR,
MISSOURI DEPARTMENT OF NATURAL RESOURCES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE BRONX HOUSEHOLD OF FAITH AS AMICUS CURIAE SUPPORTING PETITIONER

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BRIEF FOR THE BRONX HOUSEHOLD OF FAITH AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF AMICUS CURIAE

The Bronx Household of Faith is an evangelical Christian church formed in 1971 and located in University Heights, one of the lowest-income neighborhoods in the Bronx, New York City's lowest-income borough.[1]

[1] Pursuant to Rule 37.6, Bronx Household affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than Bronx Household, its members, or its counsel made such a monetary contribution. The

The church conducts worship services each Sunday and performs significant community outreach throughout the week. Over the past forty years, Bronx Household has assisted University Heights residents with basic needs such as food, clothing, and rent, and has provided counseling on how to escape poverty and leave behind crime and drug use.

When the church began to outgrow the house where it was meeting, Bronx Household sought permission from the New York City Board of Education to use the auditorium in a nearby public school to host its Sunday services. The Board of Education has long allowed community groups to meet in city schools during non-school hours for a wide variety of purposes, yet the Board denied Bronx Household's request. It did so for only one reason: because the meetings would involve religious worship.

Bronx Household and its pastors sued the New York City Board of Education, asserting violations of the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment to the United States Constitution. The dispute, which spanned two cases and nearly twenty years, resulted in five decisions from the Second Circuit. The court of appeals rejected the church's free speech and establishment claims.

In 2014, a split panel of the Second Circuit issued its final decision in the case and held that the Board of Education did not violate the Free Exercise Clause by denying Bronx Household's application. *Bronx Household of Faith* v. *Board of Education*, 750 F.3d 184, 189-190

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parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

(2014), cert. denied, 135 S. Ct. 1730 (2015). The majority reached that decision in part by reading a precedent at the center of the instant case, *Locke* v. *Davey*, 540 U.S. 712 (2004), broadly to provide that strict scrutiny does not apply to laws that facially discriminate against religion but are motivated by an asserted desire to comply with the Establishment Clause. 750 F.3d at 193-195.

Bronx Household respectfully submits that *Locke* does not stand for that proposition. Courts of appeals—including the Eighth Circuit in this case and the Second Circuit in *Bronx Household*—have misread and misused *Locke* to sanction facial discrimination against religion far beyond the careful boundaries the Court drew in that case. *Locke* does not license all religious discrimination that can be explained away as an attempt to pursue anti-establishment goals. This Court now has an opportunity to clarify *Locke*'s scope and return the decision to its limited position in the free exercise case law. Bronx Household files this brief to encourage the Court to seize that opportunity and correct the lower courts' expansive interpretation of *Locke*. Because Bronx Household continues to feel the effects of a misreading of *Locke*, the church has a significant interest in this case.

SUMMARY OF ARGUMENT

Bronx Household agrees with petitioner Trinity Lutheran Church that strict scrutiny should apply to the State of Missouri's decision to deny Trinity Lutheran's application for a Missouri Scrap Tire Grant. Under the Free Exercise Clause, strict scrutiny applies whenever a law is not neutral toward religion and burdens religious practice. Missouri has not acted neutrally toward religion: state officials denied Trinity Lutheran's application solely because of the church's religious status. And by conditioning access to the grant program on an appli-

cant's religious affiliation, the State has burdened religious freedom. Strict scrutiny should therefore apply.

This Court's decision in *Locke* v. *Davey*, 540 U.S. 712 (2004), does not change the result. *Locke* concerned a state-funded college scholarship program that provided funds only to pay for secular degrees. A student challenged the exclusion of religious degrees under the Free Exercise Clause, and this Court upheld the admittedly discriminatory law without applying strict scrutiny. The Court explained that the burden on religious freedom was mild; the benefit the State offered included only secular studies, and that benefit was available to religious and irreligious students alike. The State could exclude religious studies from the benefit, the Court reasoned, because of our Nation's long history of concern about using public funds to train religious leaders. The Court concluded that, if any space exists between the two Religion Clauses, it must be in that case, where the State's antiestablishment interest was "historic and substantial" and the burden imposed was "minor."

As is evident from its reasoning, *Locke* stands only for a limited proposition: strict scrutiny does not apply when the State (a) minimally burdens religion, such as by forbidding private actors from directing public funding toward religious ends, and (b) has a historical and substantial antiestablishment interest in doing so. Without grounding the State's antiestablishment interest in history, *Locke*'s burden analysis would be question begging. The Free Exercise Clause must require more justification for disparate treatment than an assertion that the religious and the secular are different. But history alone cannot lower the level of scrutiny, as this Court has applied strict scrutiny even to a law with significant historical support that discriminated on the basis of religion. That is what makes *Locke*'s focus on the nature of

the burden important. When a State allows private individuals to direct public funds toward a private end, a requirement that the recipient use the funds for secular, rather than religious, purposes burdens religion minimally. Only in that context, where a historical antiestablishment interest outweighs the minimal burden, is a lower level of scrutiny warranted.

Lower courts, however, have incorrectly interpreted *Locke* to do away with strict scrutiny analysis for facially discriminatory laws even absent a finding that the asserted antiestablishment interest is historically significant and the burden is minimal. By failing to enforce the limits this Court placed on the "play in the joints" between the Religion Clauses, lower courts have applied near-complete deference to asserted state antiestablishment interests and have approved burdens far greater than the denial of funding for religious purposes.

This case is a prime example. Here, the State of Missouri has neither history nor context on its side. No historical state antiestablishment interest supports the denial of the Scrap Tire Grant. Nor has the State minimally burdened religion; rather, it has conditioned access to a public program based on the applicants' religion. In these circumstances, strict scrutiny applies, and the State cannot clear that high bar.

ARGUMENT

A. *Locke* Created A Narrow Exception To The General Rule That Strict Scrutiny Applies To Laws That Facially Discriminate Against Religion

1. The First Amendment's Religion Clauses provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These two provisions together "mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee* v. *Weisman*, 505 U.S. 577, 589 (1992). "A proper respect for both * * * compels the State to pursue a course of 'neutrality' toward religion." *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 512 U.S. 687, 696 (1994) (internal quotation marks omitted).

On one side of the neutrality balance, the Free Exercise Clause at a minimum provides protection from any law that "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993); see *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872, 877 (1990). On the other side of the neutrality balance, the Establishment Clause prevents the government from "favoring * * * one religion over others []or religious adherents collectively over nonadherents," *Grumet*, 512 U.S. at 696, while at the same time permitting governmental affiliations with religion that "w[ere] accepted by the Framers and ha[ve] withstood the critical scrutiny of time and political change," *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1819 (2014).

Laws that deny access to public programs or benefits because of a person's religion primarily implicate the

Free Exercise Clause. And such laws almost always transgress its protections. See, *e.g.*, *McDaniel* v. *Paty*, 435 U.S. 618, 628-629 (1978); *Torasco* v. *Watkins*, 367 U.S. 488, 496 (1961); cf. *Rosenberger* v. *Rector and Visitors of the University of Virginia*, 515 U.S. 819, 837, 845-846 (1995). The applicable standard of review explains why: when a law (a) burdens religious practice or adherence and (b) is not neutral toward religion, the Free Exercise Clause mandates that it "undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546. Laws that exclude a person "from receiving [public] benefits" "because of their faith, or lack of it," burden the exercise of religion. *Everson* v. *Board of Education of Ewing*, 330 U.S. 1, 16 (1947). "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed" for exercising one's religion in the first place. *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963). In addition, when the text of a law expressly conditions access to a government benefit on religious belief (or absence thereof), the law lacks neutrality, "the minimum requirement of [which] is that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533.

Accordingly, to justify the denial of access to public programs or benefits based on religion, the government must demonstrate the denial is narrowly tailored to advance "interests of the highest order." *Lukumi*, 508 U.S. at 546 (internal quotation marks omitted); see *Smith*, 494 U.S. at 886 n.3. That is a high bar to clear. Generally, therefore, "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas* v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707, 716 (1981).

2. In a smaller set of cases, laws denying access to public benefits may implicate both the Free Exercise Clause and the Establishment Clause. Those cases involve discrimination based on religion done in an effort to further antiestablishment interests. Compliance with the Establishment Clause, for example, would qualify as a compelling interest sufficient to justify narrowly tailored discrimination based on religion. See *Widmar* v. *Vincent*, 454 U.S. 263, 271 (1981).

The Establishment Clause, however, does not *require* States to deny access to a generally available public benefit because the recipient is a religious individual or organization. See *Bowen* v. *Kendrick*, 487 U.S. 589, 608 (1988). But some state laws do impose such a restriction. See, *e.g.*, Mo. Const. art. I, § 7; Wash. Const. art. I, § 11. Regarding those laws, this Court has recognized that a State may have a valid antiestablishment interest—*i.e.*, a legitimate interest in maintaining a separation between church and state—short of avoiding actions that would violate the Establishment Clause. There exists "play in the joints" between the Religion Clauses, to put it another way, such that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke*, 540 U.S. at 718-719; see *Walz* v. *Tax Commission of City of New York*, 397 U.S. 664, 669 (1970). In that space between the two clauses, States may require extra-constitutional church-state separation without improperly burdening the free exercise of religion.

3. In *Locke* v. *Davey*, 540 U.S. 712 (2004), this Court for the first time gave content to the space between the Religion Clauses.

Locke involved a Washington law that granted a state-funded college scholarship to any high school senior who satisfied certain academic criteria. 540 U.S. at

715-717. Davey received the scholarship and intended to use it to pursue a degree in pastoral ministries, a course of study designed to train Christian pastors. See *id.* at 717. Washington law, however, forbade scholarship recipients from using the funds to pursue a "degree in theology" because the state constitution barred the application of public money to religious instruction. *Id.* at 716. Under the law, Davey could study pastoral ministries without losing the scholarship, but the scholarship funds would have to go toward a secular course of study at a different college than the one where he studied pastoral ministries. *Id.* at 721 n.4. Davey sued, alleging that Washington's restriction on the use of the scholarship funds violated the Free Exercise Clause. *Id.* at 718.

This Court disagreed. Davey argued that, applying strict scrutiny, the Washington law was "presumptively unconstitutional" because it was not facially neutral toward religion. *Locke*, 540 U.S. at 720 (citing *Lukumi*, *supra*). The Court did not deny that the law lacked neutrality, but it refused to apply strict scrutiny, based on its assessment of the burden prong of the free exercise analysis. The burden placed on religious exercise by the exclusion of pastoral studies from the scholarship, the Court explained, was "of a far milder kind" than the burdens seen in other free exercise cases. *Ibid.* The State had not criminally or civilly penalized any religious practice. *Ibid.* (referencing *Lukumi*, *supra*). It had not excluded theology students from participation in state politics. *Ibid.* (citing *McDaniel*, *supra*). Nor had it "require[d] students to choose between their religious beliefs and receiving a government benefit," because students pursuing a theology degree could use the scholarship for another course of study at another school. *Id.* at 720-721 & n.4 (citing *McDaniel*, *supra*; *Hobbie* v. *Un-*

employment Appeals Commission of Florida, 480 U.S. 136 (1987); *Thomas*, *supra*; and *Sherbert*, *supra*).

Instead, the Court explained, the State had "merely chosen not to fund a distinct category of instruction," *i.e.*, "training for religious professions." 540 U.S. at 721. Looking to history, the Court found that the State's distinction between funding for religious training and funding for secular education implicated a legitimate antiestablishment interest. See *id.* at 721-723. In particular, the Court explained, our Nation since the Founding had expressed a strong aversion to funding the training of ministers from the public fisc. *Id.* at 722-723. Many state constitutions prohibited the use of public funds to support the ministry, *id.* at 723, and, in others, "popular uprisings" occurred against the practice, *id.* at 722.

The Court thus concluded that the State possessed a "historic and substantial state interest" in not funding religious professions. *Locke*, 540 U.S. at 725. That interest, combined with the "relatively minor burden" that "the exclusion of such funding" placed on scholarship recipients, convinced the Court that, "[i]f any room exists between the two Religion Clauses"—such that the State was permitted to treat the religious and nonreligious differently even though the Establishment Clause did not so require—"it must be here." *Ibid.*

B. The Historical Antiestablishment Interest And Minimal Burden Were Both Necessary To *Locke*'s Holding

Locke is best understood to stand only for a relatively narrow proposition: a state law that minimally burdens religion, such as one forbidding private actors from directing public funding toward religious ends, need not face strict scrutiny if the law is rooted in a "historical and substantial" antiestablishment interest. Both the history

supporting the State's interest in not funding the training of clergy and the minimal burden at issue were central to *Locke*'s holding.

1. Absent the history substantiating the State's antiestablishment interest, the Court in *Locke* would have had little ground on which to affirm the State's facially discriminatory law. It is not enough to say that the State may treat the religious and the secular differently because it thinks the two are different. That begs the ultimate question whether the State can permissibly distinguish between the religious and nonreligious in the relevant context. Answering *that* question requires an explanation of why, in the particular context, the religious differs sufficiently from the secular that the Free Exercise Clause tolerates disparate treatment.

In *Locke*, history provided the answer. Because our Nation had a long tradition of treating funding for religious vocations as different in kind from funding for secular education, the Court was persuaded that the State had a valid antiestablishment interest in making the distinction. In other words, history demonstrated that the State could differentiate without violating the Free Exercise Clause. Accord Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty*, 118 Harv. L. Rev. 155, 215 & n.391 (2004); cf. *Galloway*, 134 S. Ct. at 1819.

Without that history, *Locke*'s analysis would devolve into deference to a State's mere say-so: the State believes it has a legitimate antiestablishment interest at stake, so strict scrutiny does not apply. But that cannot be the constitutional line. At bottom, an "antiestablishment interest" is just a philosophical desire to treat something religious in nature differently from something secular in nature to further a specific goal, namely, greater separation between church and state. As Justice

Scalia noted in his dissent in *Locke*, this philosophical desire, standing alone, "has no logical limit and can justify the singling out of religion for exclusion from public programs in virtually any context." 540 U.S. at 730. One might think, for example, that a State should avoid contracting with a Muslim small business owner because the owner might donate his profits to a local mosque. Or one may think a State should withhold Medicare benefits from an evangelical Christian because, if healthy, the individual might proselytize others. Regardless of the interest, state actions based on those beliefs would result in abject discrimination. A Muslim would lose a contract bid because she follows Islam, and a Christian would be denied Medicare benefits because she espouses Christianity. Any State taking such an approach to religion would transgress the Free Exercise Clause and the Equal Protection Clause to boot. See *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (per curiam); *Torasco*, 367 U.S. at 496. That explains why the *Locke* majority expressly disavowed that "[a] State [can] justify any interest that its 'philosophical preference' commands." 540 U.S. at 722 n.5.

This Court has already rejected extreme deference to a State's philosophy on religion in any event. That a State views the religious as different in kind than the secular does not automatically mean courts must treat them as different in kind for the purposes of constitutional analysis. See, *e.g.*, *Good News Club* v. *Milford Central School*, 533 U.S. 98, 111-112 (2001); *Rosenberger*, 515 U.S. at 830-831; *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384, 390-397 (1993). The holding in *Locke*, therefore, necessarily rests in part on the majority's historical analysis of the claimed anti-establishment interest. Without that interest, the rule in

Locke would have no limiting principle and thus would negate the Free Exercise Clause's protections.

2. The minimal nature of the burden at issue in *Locke* was also central to the Court's holding. The State of Washington had allowed private actors (students) to direct public funds (scholarship money) toward a private end (a student's desired course of college education). Any recipient—religious or not—could use the public funds, but not toward a religious end (a theology degree). If a recipient decided to pursue a religious end, he could still use the funds, albeit only toward a separate, secular end (a secular course of study at another institution). The State "merely chose[] not to fund" religious ends over secular ends. 540 U.S. at 721. It did not deny the benefit based on the recipient's religious choice, as even pastoral-ministry majors could use the scholarship elsewhere. Were the burden not so "mild[]," the Court suggested the result might have been different. See *id.* at 720-721. *Locke* thus extends no further than cases in which the government minimally burdens religion, such as by restricting private individuals' ability to direct the use of public funds toward privately desired religious ends over privately desired secular ends. *Id.* at 720.

The Court's focus on the minimal burden was necessary to the holding for the additional reason that the Court's historical analysis, by itself, was insufficient to justify the outcome. This Court's decision in *McDaniel* v. *Paty*, 435 U.S. 618 (1978), illustrates the point. *McDaniel* involved a Tennessee statute barring ordained ministers from serving as delegates to the State's constitutional convention. *Id.* at 620 (plurality opinion). The practice of excluding ministers from public office had a long historical pedigree. Such exclusions began in sixteenth-century England, *id.* at 622 (citing *In re MacManaway*, [1951] A.C. 161, 164, 170-171), and seven of the

original States had continued the practice after the Revolution, *ibid.* Some States even continued to bar ministers from public office after the passage of the First Amendment. *Id.* at 623. Be that as it may, the Court in *McDaniel* applied strict scrutiny and struck down the last remaining such state law without showing any deference to the State's asserted antiestablishment interest. See *id.* at 628-629; accord *id.* at 632-634 (Brennan, J., concurring); *id.* at 642-643 (Stewart, J., concurring). A historical antiestablishment interest, therefore, cannot alone justify a significant burden on religious practice. The fact that the burden in *Locke* was the "far milder" failure to fund a specific private choice accordingly played an important role in the case's holding. 540 U.S. at 720.

3. The Court in *Locke* also noted that nothing in the history, text, or operation of the relevant laws suggested animus toward religion. 540 U.S. at 725. But the Court nowhere suggested that a finding of animus was necessary to invoke strict scrutiny; indeed, such a ruling would have sub silentio overturned precedent to the contrary.

Under this Court's case law, a law "born of animosity toward the class of persons affected" is per se unconstitutional. *Romer* v. *Evans*, 517 U.S. 620, 634 (1996); see also, *e.g.*, *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985); *Department of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973). Had the State of Washington excluded pastoral-ministry majors from the scholarship program out of animus toward religion, the restriction presumably would be invalid despite the mild burden at issue. See *Romer*, 517 U.S. at 634. The *Locke* Court addressed the hostility issue to dispense of this alternative ground for invalidating the scholarship exclusion.

The *Locke* decision, however, did not change settled law that a court need not find animus before strict scrutiny will apply to a facially discriminatory law. Cf. *Shrum* v. *City of Coweta*, 449 F.3d 1132, 1144-1145 (10th Cir. 2006) (McConnell, J.). Consider once again *McDaniel*. The record in that case contained no evidence that the law barring ministers from political office grew out of hostility toward religion. The British Parliament excluded ministers to maintain its independence from the Crown. 435 U.S. at 622. And in the early States, the exclusion served "to assure the success of a new political experiment, the separation of church and state." *Ibid.* The Court in *McDaniel* nevertheless applied strict scrutiny and held that the practice violated the Free Exercise Clause. The lack of animus mattered not. So too with *Locke*: A finding of animus might have triggered strict scrutiny, but such a finding was not necessary to invoke that standard of review.

In sum, *Locke*'s focus on the history of the interest and the minimal burden at issue limits the opinion's reach. *Locke* provides only that a state law minimally burdening religion need not survive strict scrutiny if the law is rooted in a "historical and substantial" antiestablishment interest.

C. Lower Courts, Including The Eighth Circuit Here, Have Misinterpreted *Locke*

As the Eighth Circuit noted in this case, the breadth of the *Locke* decision has been a topic of "active academic and judicial debate," and a consequent source of confusion for lower courts. Pet. App. 10a; see *id.* at 30a (Gruender, J., concurring in part and dissenting in part). At least one court of appeals has read *Locke* narrowly as intended. See *Colorado Christian University* v. *Weaver*, 534 F.3d 1245, 1254-1257 (10th Cir. 2008) (McConnell,

J.). Other courts, however, have incorrectly read *Locke* to sweep much more broadly than its holding allows, dispensing with strict scrutiny analysis for facially discriminatory laws even absent a finding that the asserted antiestablishment interest is historically significant and the burden is minimal. By failing to enforce the bounds this Court placed on the "play in the joints" it recognized in *Locke*, lower courts have applied near-complete deference to asserted state antiestablishment interests and have approved burdens far greater than the denial of funding for religious purposes. The Court should take this opportunity to correct those flawed and overbroad interpretations of *Locke*.

1. The court of appeals in the instant case erroneously declined to apply strict scrutiny because it failed to recognize the limits of *Locke*'s analysis.

Strict scrutiny governs whether, as applied to Trinity Lutheran, the Missouri Constitution's prohibition on public funds being used in aid of a church violates the Free Exercise Clause. The relevant provision discriminates against religion on its face. See Mo. Const. art. I, § 7. And, as applied here, the provision forces Trinity Lutheran "to choose between [its] religious beliefs and receiving a government benefit." *Locke*, 540 U.S. at 720-721. The State put the church to an express choice: disaffiliate the church or its pre-school from religion or forgo the Scrap Tire Grant to which it otherwise was entitled. That is exactly the type of ultimatum that triggers strict scrutiny under the Free Exercise Clause. See *Thomas*, 450 U.S. at 716; *McDaniel*, 435 U.S. at 627-629; *Torasco*, 367 U.S. at 496.

Locke provides no basis to lower the level of scrutiny here. First, the burden on religion here exceeds the burden on religion in *Locke*. In *Locke*, scholarship recipients did not lose their scholarship based on their choice

of a religious degree; they could still use the scholarship toward another course of study at a different school. *Locke*, 540 U.S. at 721 n.4. Here, however, Missouri has conditioned access to the Scrap Tire Grant on the applicant's religious status: religious applicants do not qualify. That is a paradigmatic example of a burden on religion that triggers strict scrutiny. See, *e.g.*, *Thomas*, 450 U.S. at 716.

Second, the State has no legitimate antiestablishment interest in denying Trinity Lutheran access to the Scrap Tire Grant. In fact, the State has never attempted to explain how its asserted interest could be considered "historic and substantial." See Resp. Ct. App. Br. 25-38.

The court of appeals erred by overlooking both of these points. The court did not analyze the nature of the burden on Trinity Lutheran. And it accepted the asserted interest in preventing "direct expenditure of public funds to aid a church," Pet. App. 12a n.3, without considering whether that claimed interest was "historic and substantial." See *id.* at 10a-12a & n.3. The court of appeals essentially treated the State's asserted antiestablishment interest, and *Locke*, as a get-out-of-strict-scrutiny-free card.

2. Amicus Bronx Household has seen this type of overbroad reading of *Locke* before. It is the analysis that the Second Circuit undertook when it rejected Bronx Household's free exercise claim against the New York City Board of Education. See *Bronx Household of Faith* v. *Board of Education*, 750 F.3d 184, 193-195 (2014), cert. denied, 135 S. Ct. 1730 (2015). As explained above, pp. 2-3, *supra*, the Board opens up space in public schools across New York City for use by community groups outside of school hours. Bronx Household applied under this program to use a nearby school's auditorium for its Sunday worship services. The Board denied

that request only because the meeting involved religious worship.

The Second Circuit upheld the regulation without applying strict scrutiny. *Bronx Household*, 750 F.3d at 199-200. Ignoring *Locke*'s careful inquiry into the validity of the asserted state interest, the Second Circuit held that "strict scrutiny cannot reasonably be understood to apply to rules that focus on religious practices in the interest of observing the concerns of the Establishment Clause." *Id.* at 195. In the court's view, the Board was free to discriminate on the basis of religion "if it makes a reasonable, good faith judgment that it runs a substantial risk of incurring a violation of the Establishment Clause." *Id.* at 198. The Board claimed an antiestablishment interest to justify its regulation, so the court of appeals refused to apply strict scrutiny. *Id.* at 191-195.

The Board may have claimed *an* antiestablishment interest, but it did not claim a *legitimate* one. The Board never explained how its interest in excluding church services from empty public school buildings could be considered "historic and substantial." That is unsurprising. Churches have met in public buildings for worship since the Founding. See James H. Hutson, *Religion and the Founding of the American Republic* 84-92 (1998). "Church services in the House [of Representatives] began as soon as the government moved to Washington, in the fall of 1800," *id.* at 84, and were held consistently there until after the Civil War, see Library of Congress, *Religion and the Founding of the American Republic* <http://tinyurl.com/religionandfounding>. Presidents Thomas Jefferson, James Madison, and John Quincy Adams attended those services during their terms in office. See Hutson, *supra*, at 85, 87, 96.

Nor was this type of practice abandoned in the modern era. Out of the fifty largest school districts in the

United States at the time of the Bronx Household litigation, only New York City banned religious worship services from its facilities. See *Bronx Household of Faith*, 750 F.3d at 208-209 (Walker, J., dissenting) (citing Brief of Amicus Curiae New York City Council Black, Latino, and Asian Caucus at 9-12). Without addressing this evidence, the Second Circuit deferred to the Board's asserted antiestablishment interest.

The Second and Eighth Circuits are not alone. Other courts, citing *Locke*, also have failed to scrutinize asserted state antiestablishment interests when analyzing free exercise claims. See, *e.g.*, *Eulitt ex rel. Eulitt* v. *Maine Department of Education*, 386 F.3d 344, 355 (1st Cir. 2004); *University of the Cumberlands* v. *Pennybacker*, 308 S.W.3d 668, 679-680 (Ky. 2010), *Bush* v. *Holmes*, 886 So. 2d 340, 364-365 (Fla. Ct. App. 2004).

The Court now has an opportunity to correct these flawed readings of *Locke* and provide the lower courts with much-needed guidance. The Court should clarify that courts may not simply defer to a State's assertion of an antiestablishment interest when determining whether strict scrutiny should apply. The State must provide a history of establishment concerns aligned with the specific exclusion of religion the State seeks to justify. A broader reading of *Locke* would inappropriately allow States to justify any law based on their own philosophical conception of church-state relations, regardless of how extreme. That rule would permit discrimination that the Federal Constitution without question bars today.

The court of appeals below failed to recognize the flaws in its reading of *Locke* and, as a result, applied the wrong level of scrutiny. 540 U.S. at 722-723. Had the court applied strict scrutiny as it should have, Trinity Lutheran would have prevailed. The State of Missouri has not proven, and cannot prove, that the rejection of

Trinity Lutheran's Scrap Tire Grant application is narrowly tailored to advance a governmental interest of the highest order. Under a proper reading of *Locke*, therefore, Missouri has violated the Free Exercise Clause.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise, Establishment, or Equal Protection Clauses of the First Amendment when the state has no valid Establishment Clause concern in preventing access to the program.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The present case concerns Cato because religious liberty is foundational to a free society.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since the adoption of the First Amendment, and even since the enactment of the Fourteenth Amendment, the Court has wrestled with the meaning of the religion clauses. At this point, it's clear that any "wall of separation between Church and State" created by the Establishment Clause is not impenetrable. *See* Letter from Thomas Jefferson, to Nehemiah Dodge, Ephraim Robbins & Stephen S. Nelson, Comm. of the Danbury Baptist Ass'n in the State of Conn. (Jan. 1, 1802) (on file with the Library of Cong.).

Not every aspect of a church's existence involves the government (thankfully), but in the modern

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[1] Rule 37 statement: All parties received timely notice of the *amicus curiae*'s intent to file this brief; the parties' consent letters have been filed with the Clerk. Counsel for the *amicus* certifies that no counsel for any party authored any part of this brief and that no person or entity other than *amicus* made a monetary contribution to fund its preparation or submission.

world, governments are inevitably involved in much of what churches do. This Court has determined that granting tax-exempt status to church property, for example, does not violate the Establishment Clause, *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 667 (1970). It is also well understood that the Free Exercise Clause is not violated when the government requires churches, like any other employer, to withhold taxes from their non-ministerial employees. Internal Revenue Service, Publication 1828, *Tax Guide for Churches & Religious Orgs.* 21 (2015).

A "church" is not merely an abstraction, nor even a collection of individuals. A "church" often comprises several symbiotic organizations that desire to impact the world, thus necessitating interaction with the government. Many churches operate charities, or schools, or daycares. Many let other groups—sometimes different churches or religious associations, but also ones that are not religious, like community dance clubs—use or rent the church's property. Countless churches have a playground or other type of outdoor space that locals use after hours as if it were a public park.

Yet because Trinity Lutheran is a church—and solely on that basis—Missouri denied its application to the scrap-tire grant program. Now the state defends its blatant and facial discrimination against religion under its own constitutional provision and this Court's holding in *Locke v. Davey*, 540 U.S. 712 (2004). Those arguments must fail.

Article I, Section 7 of the Missouri Constitution reads, in part: "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion." This

"Blaine Amendment" was originally enacted in 1875, and it is a product of religious bigotry. The Court should not ignore the dark and prejudicial history of Missouri's Blaine Amendment, which was passed for explicitly anti-Catholic, discriminatory purposes. This is true regardless of the amendment's retention at the state's 1945 constitutional convention.

Missouri's discrimination here does not lie within the "play in the joints" between the Establishment and Free Exercise Clauses. To the contrary, the state's refusal to award Trinity Lutheran the playground-surface grant is unconstitutional viewpoint discrimination. Having decided to award these grants, Missouri must award them fairly, without reference to the religious or secular nature of the applicants. The fact that Trinity Lutheran can continue operating as a church without the grant does not remedy the violation.

Finally, the state's action violates the Equal Protection Clause by discriminating based on religion, an axiomatic foundation for strict judicial scrutiny.

ARGUMENT

I. MISSOURI'S BLAINE AMENDMENT CANNOT BE DIVORCED FROM ITS ANTECEDENTS IN RELIGIOUS BIGOTRY

This Court has recognized that Blaine Amendments are not a benign expression of a desire for a strict separation of church and state. Justice Thomas, writing for the four-member plurality in *Mitchell v. Helms*, 530 U.S. 793, 828 (2000), stated that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Consideration of the [Blaine] Amendment arose at a time

of pervasive hostility to the Catholic Church and to Catholics in general. And it was an open secret that 'sectarian' was a code word for 'Catholic.'"

Similarly, the Arizona Supreme Court refused to apply that state's Blaine Amendment to a tax-credit program, noting that "[t]he Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing 'Catholic' menace." *Kotterman v. Killian*, 972 P.2d 606, 626 (Ariz. 1999).[2] Laws that are "born of bigotry" have no place in our system of liberty. *Mitchell*, 530 U.S. at 829.

These dark roots apply specifically to the Missouri's Blaine Amendment as well. Missouri originally enacted its constitutional amendment in 1875, about a year before Congress voted down the federal Blaine Amendment. *See* Steven B. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992). This proximity is no coincidence. Anti-Catholic sentiment was spreading throughout the United States, and Missouri was no exception. Indeed, political forces such as the Know-Nothing Party—partially spurred by religious animus—created a persistent atmosphere of political intimidation. *See* William Hyde, 4 *Encyclopedia of the History of St. Louis* 97 (So. History Co. 1899) (1917). This animus was noted by a Missouri state senator: "Why not say in plain English what is intended" by adding "Catholic" to the proposal? *Synopsis of Remarks by Senator Spaunhorst*, Weekly Tribune (Mar. 1870).

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[2] The court went on to say, "we would be hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it." *Kotterman*, 972 P.2d at 626.

In *Zelman v. Simmons-Harris*, Justice Breyer wrote that anti-Catholic "sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for 'sectarian' (i.e., Catholic) schooling for children." 536 U.S. 639, 720 (2002) (Breyer, J., dissenting). In the words of two leading scholars, the "Blaine Amendment expressed Republican and Protestant hostility toward religious (meaning Catholic) schools." John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 351 (2001).

Respondents seek to ignore the history of the Missouri Blaine Amendment by arguing that the amendment arose from factors other than anti-Catholicism, and that there is no evidence that Missouri's Blaine Amendment was motivated by anti-religious or anti-Catholic animus. That is not, however, what the history shows.

II. MISSOURI'S DISCRIMINATION AGAINST TRINITY LUTHERAN VIOLATES BOTH RELIGION CLAUSES, PLUS THE EQUAL PROTECTION CLAUSE

Religious freedom is vital to a free society, and the Constitution memorializes this sentiment in multiple places and ways. *See, e.g., Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947). In the words of President Obama, "our commitment to religious freedom must be unshakeable. The principle that people of all faiths are welcome in this country and will not be treated differently by their government is essential to who we are." Kenneth C. Davis, *America's True History of Re-*

ligious Tolerance, Smithsonian Magazine (Oct. 2010), http://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/?no-ist.

Although the two clauses work in different ways, a law can violate both the Free Exercise Clause and the Establishment Clause. Conditioning a benefit on religious status imposes "a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity," thus violating the Free Exercise Clause. *McDaniel v. Paty*, 435 U.S. 618, 632 (1978) (Brennan, J., concurring). And "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Id.* at 641 (Brennan, J., concurring). Both violations are present here.

In addition to the portions of the Constitution that apply directly to religion, the Fourteenth Amendment's Equal Protection Clause also protects against denying a benefit solely on the basis of religious status—which is precisely what Trinity Lutheran experienced here. Such a distinction must face strict judicial scrutiny. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (strict scrutiny applies under the Equal Protection Clause where "a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage").

In short, under either the religion clauses or under the Equal Protection Clause, Missouri's discrimination here is unconstitutional.

A. Missouri's Refusal to Award a Generally Available Benefit to Trinity Lutheran Violates Both Religion Clauses

1. Withholding the Grant Violates the Free Exercise Clause.

In *McDaniel v. Paty*, this Court overturned a provision of the Tennessee Constitution—adopted in 1796 as part of the state's first constitution—that prohibited clergy from holding office. 435 U.S. at 621. The Court held that the prohibition "encroached upon McDaniel's right to the free exercise of religion" because the Free Exercise Clause "prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *Id.* at 626. In Justice Brennan's words, "disqualification provision imposed an unconstitutional penalty upon appellant's exercise of his religious faith." *Id.* at 633 (Brennan, J., concurring).

When the government "handicaps" religion, it violates the Free Exercise Clause. *Everson*, 330 U.S. at 18 ("State power is no more to be used so as to handicap religions than it is to favor them."). Although *Employment Division v. Smith*, 494 U.S. 872 (1990) changed the landscape for free exercise claims, it only did so for "neutral, generally applicable laws." *Id.* at 881. Post *Smith*, a state certainly could not ban the worship of the divine, for example. Nor could a state offer scholarships to all students except those who regularly attend church. A law that requires people to choose between scholarships and religious service would violate the Free Exercise Clause by "burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). It would "impose special disabilities on the basis of religious status." *Smith*, 494 U.S. at 877.

Similarly, Missouri's discrimination against Trinity Lutheran also "imposes special disabilities" on the basis of religious status in violation of the Free Exercise Clause. In denying the church's application, the Department of Natural Resources made this quite clear: "the department is unable to provide this financial assistance directly to the church." Petition for Certiorari 7, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577. Because this is a facial distinction, and not a "neutral law of general applicability," *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982)), it must meet a higher level of scrutiny. The "minimum requirement of neutrality is that a law not discriminate on its face." *Church of the Lukumi*, 508 U.S. at 533. Although Missouri's constitution disfavors religion generally—rather than religious practices—as in *Church of the Lukumi*, that difference is not material because the government must "maintain strict neutrality, neither aiding nor opposing religion." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963).

Missouri's facially discriminatory Blaine Amendment cannot meet the heightened scrutiny required by *Smith* and, ultimately, by *Sherbert v. Verner*, 374 U.S. 398 (1963). See, *Smith*, 494 U.S. at 878 (it would be unconstitutional to "to prohibit bowing down before a golden calf."). The Blaine Amendment is facial discrimination against religion *per se* that is as constitutionally intolerable as prohibiting the "casting of statues that are to be used for worship purposes." *Id.*

The Free Exercise Clause protects against facial discrimination based on religious status just as it protects against specific discrimination against religious beliefs. *McDaniel*, 435 U.S. at 643 ("Tennessee here has penalized an individual for his religious sta-

tus—for what he is and believes in—rather than for any particular act generally deemed harmful to society.") Although *McDaniel* predates *Smith*, the *Sherbert* test is still in place for non-neutral laws. *Smith*, 494 U.S. at 881; *see also*, Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 201 (2004) ("Under *Smith*, the threshold question is whether the law that burdens religious exercise is 'neutral' and 'generally applicable.' If so, the burden on religion requires no justification whatever. If not, the burden on religion is subject to the compelling interest test as before.") In *Sherbert*, a statute disqualifying from unemployment benefits those who were unwilling to work on Saturday was overturned because it forced the petitioner

> to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Sherbert, 374 U.S. at 404. Of course, that statute was neutral, so the outcome would have been different post-*Smith*. But the reasoning still applies to the non-neutral provision of Missouri's Constitution at issue here. Trinity Lutheran Church is being forced to choose between following "the precepts of [its] religion and forfeiting benefits." *Id.*

If Petitioner is viewed as a daycare center, this becomes clear. The state has in essence said that it

would have given the funds to the daycare but for the fact that it engages in religious practices. Thus, like *Church of the Lukumi*, the state is punishing an integral part of Petitioner's religion—the ability of believers to meet together to celebrate their common belief. It is irrelevant that the daycare is an entity rather than an individual, and that the state has refused to grant a benefit rather than exacted a punishment. *Cf. Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) ("[T]he First Amendment certainly has application to the subsidy context.").

2. Withholding the Grant Violates the Establishment Clause.

The Establishment Clause prohibits not only government actions establishing—endorsing, supporting, etc.—religion, but also those handicapping it. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) ("[The Establishment Clause] requires the state to be a neutral in its relations with groups of believers and nonbelievers; it does not require the state to be their adversary. *State power is no more to be used so as to handicap religions than it is to favor them.*") (emphasis added). Indeed, religious neutrality is the underpinning of this Court's longstanding *Lemon* test for assessing Establishment Clause cases.[3] But the Clause goes beyond merely allowing Missouri to give Trinity Lutheran a scrap-tire grant under its program. The Clause's mandate that government "nei-

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[3] In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court formulated the test for programs under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612–13 (internal citations omitted).

ther advances nor inhibits religion," *Lemon*, 403 U.S. at 612-13, means that the state cannot deny Trinity Lutheran a grant on the sole basis that it is a church.

While the *Lemon* test has undergone restatement in recent years, *see Agostini v. Felton*, 521 U.S. 203 (1997), its core of evenhandedness has remained intact: government may not engage in actions that have the primary effect of advancing or inhibiting religion. Nor, under the "endorsement" aspect of the test, may government express endorsement or disapproval of religion.[4] Missouri's interpretation and application of its Blaine Amendment plainly has the primary effect of inhibiting religion and conveys an unmistakable message of disapproval, especially in light of the Blaine Amendment's sordid history. See *supra*, part I.

If a church such as Trinity Lutheran wants to install a safe rubber playground surface, it will have to pay for it itself. The denial of a grant for the scrap-tire playground surface occurs solely because the applicant is a church. But for that fact, Trinity Lutheran would have been awarded one of the 14 grants given that year. *See* Petition for Certiorari 7, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577. Such a rule clearly places religion at a disadvantage vis-à-vis non-religion.

There is no such thing as a complete separation of church and state, especially in a world where government is involved in so many aspects of everyday life. But the boundary between church and state is

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[4] *See, e.g., Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 778 (1995) (O'Connor, J., concurring in the judgment); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in the judgment); *Bd. of Ed. v. Mergens*, 496 U.S. 226, 249 (1990); *Edwards v. Aguillard*,482 U.S. 578, 585 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1984).

not properly policed by handicapping religion. See, *McDaniel*, 435 U.S. at 638 (Brennan, J., concurring) ("[W]e have rejected as unfaithful to our constitutionally protected tradition of religious liberty, any conception of the Religion Clauses as stating a 'strict no-aid' theory.") When a state decides to create a scrap-tire grant program for playgrounds, it will naturally find that its program reaches churches like Trinity Lutheran that have set up daycare centers or maintain a community playground. Having thus found itself face-to-face with religion, the state must either treat religious applicants to its program the same way it treats all others or somehow argue that its discrimination is justified. Missouri chose the latter course, but its protestations lack constitutional merit.

Moreover, *Locke v. Davey*, 540 U.S. 712 (2004), does not control here. *Locke* was a unique case that dealt with a state's refusal to fund a future minister's devotional training, a historical concern that, "[s]ince the founding of our country, [has seen] popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion." *Id.*, 540 U.S. at 722. *Locke*'s Promise Scholarship Program allowed "students to attend pervasively religious schools, so long as they are accredited," and students were "still eligible to take devotional theology courses." *Id.* at 724-25. The Court also explicitly said that the program did not evince "hostility toward religion," but rather went a "long way toward including religion in its benefits." *Id.* at 724. Clearly, that is not the case here.[5]

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[5] *Amicus* filed a brief supporting Joshua Davey in *Locke v. Davey* and disagrees with the Court's holding that the scholarship program's exclusion of theology majors satisfied the Reli-

Safe playgrounds are worlds away from taxpayer-supported clergy. Missouri has shut the church out from its program even though the grants would go to something entirely distinct from religious instruction. This is not a "play in the joints" case, *id.* at 719, but one of intentionally inhibiting religion.

B. It Also Violates the Equal Protection Clause

The Equal Protection Clause limits how the government can use certain characteristics as a basis for government action. The Court has long held that the Clause, despite its Civil War-era origins, extends its protection far beyond race—*see, e.g.*, *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (discrimination against, in the words of Justice Brennan, "so-called 'hippies' and 'hippie-communes'"); *Reed v. Reed*, 404 U.S. 71, 74 (1971) (sex discrimination)—and that certainly includes religious discrimination. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 687, 715 (1996); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 650 (1992); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); *Am. Sugar Ref. Co. v. Louisiana*, 179 U.S. 89, 92 (1900). Most classifications receive only rational basis review and are generally upheld. But where government's distinction between groups involves a fundamental right like religion, the action receives strict scrutiny. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (strict scrutiny applies under the Equal Protection Clause where "a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage").

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gion or Equal Protection Clauses. Nevertheless, even if *Locke* was rightly decided, it does not support Missouri's actions here.

Certainly under the circumstances of this case, religion should constitute a suspect classification. Trinity Lutheran sought a scrap-tire grant for the playground its daycare children use to play outside. It did not seek a grant to buy more books for its library or even music books (*i.e.*, hymnals), which could have religious overtones. There is simply nothing religious about a playground surface that will make daycare and community children's duck-duck-goose games safer. Missouri cannot provide a compelling justification for discriminating against religion here.

Although this Court has recently gone far towards reducing government-sponsored religious discrimination, there can be no serious question that the history is replete with examples of religious bias in state law, of which the Blaine Amendments are but one aspect. In many circumstances, the Equal Protection Clause presents a straightforward way of identifying and rectifying religious discrimination, in much the same way that the clause has dealt with the prevalence of race discrimination.[6]

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[6] Some of the confusion regarding the Court's religion-clause jurisprudence might be dispelled by using equal-protection analysis. For example, *Sherbert*, 374 U.S. 398 (1963), *Thomas v. Review Bd.*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Comm.*, 480 U.S. 136 (1987), might appear to be inconsistent with *Smith*, 494 U.S. at 881-82 (holding that a classification must be based upon religion to be actionable under the religion clauses). This has resulted in the *Sherbert* line of cases as being viewed as exceptions requiring neutral rules to accommodate religion. They could, however, also be viewed as discrimination cases, to the extent that non-religious excuses for failing to meet the religion-neutral requirements were accepted while religious excuses were not. Similarly, *Walz v. Tax Comm.*, 397 U.S. 664 (1970), upholding tax exemptions for church property, can be analyzed as a case refusing to single out religious institutions from the class of institutions afforded tax relief. *See* Susan

In denying Trinity Lutheran a grant on the sole basis that it is a church, Missouri violated the church's right to the equal protection of the laws. If government refused to supply religious institutions with police and fire protection because they were religious, the equal protection problem would be undisputable. Similarly, for New Jersey to provide free transportation to students in all but religious schools (*Everson*) or New York to supply free secular textbooks to all students but those attending religious schools (*Bd. of Educ. v. Allen*, 392 U.S. 236 (1968)) constituted impermissible religious discrimination.

This case can thus be easily resolved under this Court's existing equal-protection jurisprudence. It is no answer to the discrimination that occurred here to say that Trinity Lutheran remains free to conduct its religious services, preach its gospel, and even operate its daycare—just as for African Americans excluded from jury service, it was no answer to argue that they could still live out all the other aspects of their lives. *See Strauder v. Virginia*, 100 U.S. 303 (1879). Or for Asian-owned laundries, it was no answer to say that they could go into another business. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Or for an African American denied admission to a state law school, it was no answer to say that he would still be given funds to attend an out-of-state one. *See Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). Discrimination of this sort is not remedied by other outlets. For that matter, that Abigail Fisher went to another college and has begun a successful career did not

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Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religious Cases (Not Just the Establishment Clause)*, 10 U. Pa. J. Const. L. 665 (2008).

cause the Court to summarily dismiss *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).[7]

Missouri's discrimination against Trinity Lutheran in the Scrap Tire Grant Program simply cannot be excused by reference to the church's continued ability to operate a church or even a daycare. Furthermore, the state's action cannot be re-characterized as anything other than discrimination on the basis of religion: Seeing that Trinity Lutheran was a church, Missouri denied it the program funds. Yes, having a daycare is not essential to running a church, but a statute banning Muslims from holding office would be religious discrimination even though holding political office is not a central tenet of the Islamic faith.

Since the religious discrimination is facial, Missouri's must meet strict scrutiny and establish that its actions achieved a compelling governmental interest through the least restrictive means. *See Fisher*, 133 S. Ct. at 2417. Missouri has asserted an interest in not violating its Blaine Amendment by giving funds to a religious organization. Because it is stipulated that no Establishment Clause violation would be present if the funds were given, and because of the Blaine Amendment's pedigree, see *supra* Part I, it is difficult to call this a compelling purpose. Moreover, however persuasive that interest may appear at first glance, it cannot stand up to constitutional challenge. Missouri cannot assert an interest arising from its own constitution that would outweigh the U.S. Constitution's ban on religious discrimination any more than it could ask for leeway in discriminating based on race if that was called for under its constitution.

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[7] Note that this is a separate issue from whether Fisher's enrollment at another university made the case moot.

Beyond the fact that a state constitutional provision is invalid if it conflicts with a federal constitutional provision, it would be illogical to allow that provision to constitute a compelling governmental interest here. Missouri's argument boils down to asserting a compelling interest in "not providing any funds to churches." This is circular reasoning; an interest cannot justify itself.

Even if Missouri's interest is reframed as not showing favor to or endorsing religion—a compelling Establishment Clause interest—denying the scraptire grant to Trinity Lutheran would not achieve that interest. Because this Court has made clear that the Establishment Clause is not violated when a government program gives aid to religious organizations on the same terms as secular ones, *Mitchell*, 530 U.S. at 835, then this Court has effectively said that including religious groups in general government programs does not promote religion.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), for example, the Court held that a state university that makes its facilities generally available for the use of registered student groups cannot close its facilities to groups that wish to use them for religious worship and discussion. *Id.* at 264–65, 267. Coincidentally, *Widmar* involved the University of Missouri, and the state argued that its discrimination was justified by its "compelling interest in maintaining strict separation of church and State" under the federal and state "Establishment Clauses." *Id.* at 265, 270.

The Court rejected Missouri's argument that opening the forum to religious groups would not violate the federal Establishment Clause. *Id.* at 271–75. The state's asserted interest "in achieving greater

separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution" was limited by federal constitutional provisions, and the Court was "unable to recognize the State's interest as sufficiently 'compelling' to justify" its discrimination in that case. *Id.* at 276. The Court added: "If the Establishment Clause barred the extension of general benefits to religious groups, 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" *Widmar,*, 454 U.S. at 274–75 (quoting *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 747 (1976)); *contra* Brief in Opposition to Petition for Certiorari 9–10, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577.

Finally, contrary to decision below, this Court can, consistent with precedent, hold that the Equal Protection Clause requires Missouri to award Trinity Lutheran a grant on the same basis as non-religious applicants. In *Widmar*, this Court required that generally open facilities be made available to religious groups, even though providing such facilities required the University of Missouri to spend more money on electricity and other utilities, as well as paying for the extra time of security guards. 454 U.S. at 265. Although students paid "an activity fee of $41 per semester to help defray the costs to the University," opening up facilities to religious groups unquestionably raised the total costs to the university.

In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 13–14 (1993), this Court held that the school district would not violate the Establishment Clause by providing a sign-language interpreter to a

student attending a sectarian school.[8] *Zobrest* arose from a request that the district provide a sign-language interpreter for a boy enrolled in a sectarian high school. *Id.* at 3. When the district refused on the basis that doing so would violate the Establishment Clause, his parents filed suit under the Individuals with Disabilities Education Act (IDEA). *Id.* at 4. The district court granted and the Ninth Circuit affirmed summary judgment in favor of the district. This Court's ruling did more than merely allow the school district to provide the interpreter. It had the practical—and legal—effect of requiring the district to provide a grant for use in a sectarian school.

Even though it was the IDEA that compelled action in *Zobrest*, that case still rebuts the Eighth Circuit's claim that nothing in "the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause compel[s] Missouri to provide public grant money directly to a church." *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 784 (8th Cir. 2015). Instead, the requirement of equal access—for "compel[ing] Missouri to provide public grant money directly to a church—is triggered by the existence of the scrap-tire grant program, something that Missouri was certainly not required to create.

Nor is this case similar to *Palmer v. Thompson*, 403 U.S. 217 (1971), where the closing of all public pools after racial integration gave rise to an equal-protection claim that was denied by this Court because nothing in the Constitution "*requires* that public swimming pools, once opened, may not be closed."

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[8] Before Catalina Foothills High School—which happens to be counsel Weber's alma mater—was established in 1992, district children attended various schools scattered throughout Tucson.

Id. at 228 (Burger, CJ, concurring) (emphasis original). In *Palmer*, had there been evidence "to show that the city is now covertly aiding the maintenance and operation of pools which are private in name only"—in other words, white-only pools—the outcome would have been different. *Id.* at 225. Similarly, if Missouri eliminated its scrap-tire program, this Court certainly could not compel it back into existence. Yet, by maintaining the program while discriminating on the basis of religion, the state is, by analogy, running white-only pools.

In sum, the Equal Protection Clause does not require Missouri to have a scrap-tire grant program, but it does demand that if the state has one, it must open it to all without regard to religious status.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit should be reversed.

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RECORD AND BRIEFS

No. 15-577

In The
Supreme Court of the United States

TRINITY LUTHERAN CHURCH
OF COLUMBIA, INC.,

Petitioner,

v.

SARA PARKER PAULEY,
IN HER OFFICIAL CAPACITY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* CHRISTIAN LEGAL SOCIETY, THE ANGLICAN CHURCH IN NORTH AMERICA, CHRISTIAN MEDICAL ASSOCIATION, FAMILY RESEARCH COUNCIL, NATIONAL RELIGIOUS BROADCASTERS, AND THE QUEENS FEDERATION OF CHURCHES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are national organizations representing religious congregations, broadcasters, physicians, lawyers, and other religious citizens, who are deeply concerned that, in this case, the state has excluded religious congregations from a benefit that serves, among other things, to promote the safety and health of children. By excluding church-operated entities and the children who attend or otherwise use them, the state has denied them equal treatment with respect to one of government's core functions: protection of the safety and health of persons within its jurisdiction. In a real sense, this exclusion treats religious communities, children, and families as less than equal citizens and relegates them to second-class status.

Detailed statements of interest for *amici curiae* are found in the Appendix.

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[1] This brief was prepared entirely by *amici* and their counsel. No person other than *amici* and their counsel made any financial contribution to the preparation or submission of this brief. The consents of the parties are on file with the Clerk.

SUMMARY OF ARGUMENT

The state of Missouri has unconstitutionally excluded petitioner Trinity Lutheran Church, simply because it is religious, from eligibility for state benefits under the Missouri Scrap Tire Program. Petitioner operates a preschool and day care center. The program provides grants to nonprofit organizations to purchase rubber pour-in-place playground surfaces made from recycled tires. Because the current playground surface used at petitioner's preschool and day care center does not adequately protect children from injury, petitioner applied for funding under the state program to resurface the playground. Although the state ranked petitioner's application high enough under the program's neutral criteria to secure a grant, it denied the application solely on the ground that petitioner is a church.

By excluding petitioner from eligibility for benefits, the state discriminated against the organization – and effectively against the individuals who use it – solely on the basis of the organization's religious status. This discrimination is presumptively unconstitutional under the Free Exercise Clause. *Amici* file this brief to emphasize that it is particularly egregious to exclude religious entities from eligibility for neutral safety- and health-related benefits such as the scrap tire program. By its exclusion, the state has denied equal treatment with respect to one of government's core functions: protection of the safety and health of persons within its jurisdiction. In a real sense, such an exclusion treats religious persons as

less than equal citizens – as it would if the state were to deny other safety benefits such as police or fire protection. The children who attend petitioner's preschool and daycare are entitled to the same eligibility for state safety benefits as are children who attend nonreligious institutions.

The court of appeals justified petitioner's exclusion from the scrap tire program by concluding that government has discretion under the First Amendment to deny benefits to religious entities without violating the Free Exercise Clause, even though the denial is not required by the Establishment Clause. The court relied on *Locke v. Davey*, 540 U.S. 712 (2004), but this case falls outside of *Locke*, for at least two reasons. First, the discretion that government officials may exercise with respect to religion should be limited – particularly the discretion to single out religion for discriminatory treatment. Second, the exclusion upheld in *Locke* was limited to the funding of training for the clergy, which the state had strong anti-establishment interests in avoiding. Here, by contrast, the state excluded a religious institution altogether from receiving a safety-related benefit whose provision raises no Establishment Clause concerns: aid for playground resurfacing is nonreligious in content, and any possibility of its use for religious purposes is *de minimis* at most.

ARGUMENT

I. BY EXCLUDING PETITIONER AND CHILDREN WHO USE ITS PLAYGROUND FROM GENERALLY AVAILABLE SAFETY BENEFITS, THE STATE VIOLATED THE FREE EXERCISE CLAUSE.

As petitioner notes, this case implicates the bedrock principle that government may not impose disabilities on entities or individuals solely because of their religious status. Pet. Br. 11-20. *Amici* wish to emphasize a specific point: It is particularly egregious to exclude religious entities and individuals from eligibility for neutral, secular safety and health benefits.

A. The State's Exclusion Discriminates Against Entities and Individuals Based on Religious Status.

A core protection of the Free Exercise Clause is that "[t]he government may not . . . impose special disabilities on the basis of religious views or religious status." *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (citing *McDaniel v. Paty*, 435 U.S. 618 (1978)). In *McDaniel*, this Court struck down a state legislative provision disqualifying clergy from serving in the state legislature. *McDaniel* has come to stand for the proposition that, as Justice Brennan put it, government may not "treat religion and those who teach or practice it, simply by virtue of their status as such, as . . . subject to unique disabilities." *Id.* at 641

(Brennan, J., concurring in the judgment); accord *Board of Education v. Mergens*, 496 U.S. 226, 248 (1990); *Smith*, 494 U.S. at 877.

A law singling out religious status for a disability also violates the "fundamental" and "minimum" requirement of the Free Exercise Clause that laws be neutral toward religion and generally applicable. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 523, 532 (1993). A law that is not neutral or generally applicable must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. *Id.* at 531-32. Under this "most rigorous [level] of scrutiny," a law singling out religion for disfavor is strongly presumed unconstitutional. *Id.* at 546 ("A law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases.").

Unquestionably, the state discriminated against religious status when it held petitioner ineligible to receive a scrap-tire material grant to resurface its playground. Likewise, this exclusion from eligibility for aid is not neutral toward religion and is not generally applicable. Public school districts, private schools, park districts, nonprofit day care centers, and other nonprofit entities are eligible to apply for a grant.[2] The state ranked petitioner's grant application

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[2] Playground Scrap Tire Surface Material Grant Application Instructions for Form 78-2143, http://dnr.mo.gov/pubs/pub2425.pdf (last visited April 10, 2016).

fifth among the 44 applications received, but the state refused to include petitioner among the 14 projects funded. Pet. App. 154a. The sole reason the state provided for the denial was that "the department is unable to provide this financial assistance directly to the church," because of Article I, section 7 of the Missouri Constitution. Pet. App. 152a-153a.

As the above quote shows, the state excluded petitioner solely on the basis of its status as a religious organization (a church) – not on the basis of any narrower interest in preventing funding from being used specifically to support religious instruction. As we discuss *infra* p. 23, that narrower interest provides no basis for denying assistance to resurface a playground. This means, among other things, that there is no Establishment Clause interest in excluding petitioner from assistance – and accordingly, no sufficient interest to justify the exclusion. See *Widmar v. Vincent*, 454 U.S. 263, 275-76 (1981) (Missouri constitution's rule of strict separation of church and state cannot be compelling enough to justify singling out religious views for exclusion from general program of benefits).

Singling out religious entities or individuals from an otherwise available government benefit can cause a number of *prima facie* harms. Not only does it treat religion unequally; it also interferes with the religious choice of individuals. In this case, for example, parents may truly desire to have their children experience a religiously grounded education. But without the receipt of this state aid, safety concerns

that result from an outdated and dysfunctional playground may discourage parents from considering the religious option. If schools do elect to repair and resurface their own playgrounds, tuition is likely to rise, discouraging parents and families who desire a religiously grounded education but struggle to pay for it.

The state relies on this Court's holding that not all instances of excluding religion from generally available funding programs violate the Free Exercise Clause. See, e.g., *Locke v. Davey*, 540 U.S. 712 (2004). But as petitioner discusses at length, this case is distinguishable from *Locke* on multiple grounds. See Pet. Br. 35-44. *Amici* want to emphasize a particularly important point: The denial of safety and health benefits because of religious status is an especially serious disability, because it treats religious persons as less than equal citizens.

B. The Exclusion from Safety and Health Benefits Violates the Free Exercise Clause by Denying Religious Entities, and Persons Using Them, Rights of Equal Citizenship.

In this case, the state has excluded petitioner from a benefit that serves, among other things, to promote the safety of children playing on playgrounds. By excluding church-operated entities and the children who attend or otherwise use them, the state has denied them equal treatment with respect

to one of government's core functions: protection of the safety and health of persons within its jurisdiction. In a real sense, this exclusion treats religious communities, children, and families as less than equal citizens.[3]

This Court and its members have often connected the theme of neutrality toward religion with the theme that persons of varying faiths are equal citizens. As the plurality said in *Board of Education, Kiryas Joel School Dist. v. Grumet*, 512 U.S. 687 (1994), "religious people (or groups of religious people) cannot be denied the opportunity to exercise the rights of citizens simply because of their religious affiliations or commitments, for such a disability would violate the right to religious free exercise." *Id.* at 698. See also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring) (free exercise protects "the right to . . . establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community").

In the context of government-encouraged prayers at a city council meeting, four justices have emphasized that "[a] Christian, a Jew, a Muslim (and so forth)" each "stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that

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[3] For similar reasons, we agree with petitioner that the exclusion also violates the Equal Protection Clause. See Pet. Br. 22-27. However, we focus here on the free exercise argument.

when each person . . . seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1841 (2014) (Kagan, J., dissenting). The same principle holds when government disqualifies a person or group from the benefits of citizenship based on their religious status.

Neutrally available safety and health benefits present the strongest instance of a case where withholding benefits on the basis of religion violates equal citizenship. "[T]he health, safety, and welfare of citizens" are the "cardinal civic responsibilities" of government. *Dept. of Revenue of Ky. v. Davis*, 553 U.S. 328, 341 (2008) (footnotes omitted).

At the dawn of the modern era of Religion Clause cases, this Court stated that families using religious schools should not be excluded "from receiving the benefits of public welfare legislation." *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). *Everson* involved government reimbursements to parents for the cost of sending their children to schools, including religiously affiliated schools, on public buses. The program's purpose was to promote safety: "to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools, rather than run the risk of traffic and other hazards incident to walking or 'hitchhiking.'" *Id.* at 7.

The Court rejected a taxpayer's suit arguing that reimbursements for children's transportation to

religious schools violated the Establishment Clause. The Court began with a strong statement of the general importance of separation of church and state. 330 U.S. at 15-16. It then held that the bus reimbursements did not violate the Establishment Clause, or the separation principle, and it relied for its rationale on the Free Exercise Clause: "[O]ther language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion." *Id.* at 16. "Consequently, [the state] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Id.* (emphasis in original).

The *Everson* Court described an exclusion from generally available safety benefits as a form of burden on free exercise. It characterized the exclusion as imposing a "handicap" on religious believers, making the state their "adversary":

> The [First] Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

Id. at 18. Applying the principle against handicapping religion, the Court said that denying religious school children the benefit of safe transportation to

school would not serve the purposes of the First Amendment. *Id.*

Everson specifically held that the exclusion of religious persons from safety benefits was not required by the Establishment Clause, but the Court also unmistakably understood the exclusion to be a violation of free exercise. Consequently, in *McDaniel v. Paty*, *supra*, Justice Brennan's crucial opinion finding clergy disqualifications unconstitutional relied on *Everson*'s statement that "'the state cannot exclude individual[s] . . . , because of their faith . . . from receiving the benefits of public welfare legislation.'" 435 U.S. at 633 n.7 (Brennan, J., concurring) (quoting *Everson*, 330 U.S. at 16).

Unsurprisingly, *Everson* analogized the transportation benefits to other safety- and health-related benefits provided directly to church-operated entities, such as "police and fire protection, connections for sewage disposal, public highways and sidewalks." *Id.* at 17-18. The Court noted that "cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate." *Id.* at 18. Among other things, "parents might be reluctant to permit their children to attend schools which the state had cut off" from benefits that promoted children's safety. *Id.* "But such is obviously not the purpose of the First Amendment." *Id.*

Amici agree with Justices Scalia and Thomas that presumptively, "[w]hen the State makes a public

benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured"; thus, to withhold that benefit "solely on the basis of religion" presumptively violates the Free Exercise Clause. *Locke*, 540 U.S. at 726-27 (Scalia, J., dissenting). But this Court need not adopt that broad principle here. Safety and health benefits present a clear case where a disqualification of religious entities denies them and the families they serve the equal "benefits of citizenship" (*Town of Greece*, *supra*), and thereby imposes an unconstitutional disability on free exercise of religion (*McDaniel*, *supra*; *Kiryas Joel*, *supra*).

The Missouri program fits squarely within these principles. The playground-resurfacing program contributes to the welfare of the general public by providing safe playground surfaces at an affordable cost. Pet. App. 102a. In its grant application, petitioner highlighted the safety risks posed by the condition of its pea gravel surface playground, which "is unforgiving if/when a child falls and thereby poses a basic safety hazard." Pet. App. 132a (noting also that the migration of the pea gravel creates a "trip[ping] hazard").

The children who attend petitioner's preschool and daycare should be accorded the same eligibility for these safety benefits as are children who attend nonreligious institutions. When a Lutheran child trips or falls on an "unforgiving" surface, her head injury is no less serious than if she attended a nonreligious private school. The state's categorical exclusion of

petitioner's preschool from program eligibility gives no weight to the safety of children attending the school and instead relegates them to second-class status.

Contrary to the ruling of the court below, the right of petitioner and individual families to be treated equally is not forfeited because petitioner is a church. See Pet. App. 10a (ruling against petitioner on the ground that it "seeks to compel the direct grant of public funds to churches, [one] of the 'hallmarks of an "established" religion'") (quoting *Locke*, 540 U.S. at 722). For starters, the scrap tire grant is no less a benefit to children and families simply because it is provided to the organization they attend. Funding to support a safer playground for children can only be provided to the organization; there cannot be playground-safety grants to families. This case is no different from *Mitchell v. Helms*, 530 U.S. 793 (2000), where this Court upheld the provision of instructional materials and equipment directly to religious schools (among other schools), noting that the program was designed "to assist children in [those] schools." *Id.* at 802 (opinion of Thomas, J.); see *id.* at 836 (O'Connor, J., concurring in the judgment) (direct grants were designed "to address the needs of educationally deprived children of low-income families").

Petitioner is a church, but it is operating a preschool, and the state should respect the children's safety and must not discriminate against them based on their religion. That petitioner chooses to operate

the school within its own (church) legal structure, rather than as a separate legal entity, should not change its eligibility for safety- and health-related benefits. To make that distinction would discriminate against religious schools based on their choices of organizational structure, thus violating the "clearest command" of the Religion Clauses: the government must not discriminate among various religious denominations. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

Even if the case involved simply the house of worship itself, the result should not change. The concern with "direct grant[s] of public funds to churches" is inapposite when the funding in question is for the safety of persons who use a church's facilities. People attending a house of worship have no less an interest in their safety and health than do persons who utilize the many other facilities that have participated in the scrap tire program. The safety and health protections this Court has endorsed – police and fire protection, water and sewer connections – are typically extended to houses of worship as well, and to refuse them to a house of worship would plainly be unconstitutional.

Churches and their congregants cannot be excluded from safety benefits merely because the benefits take the form of money grants. The court of appeals' holding would wrongly permit discrimination against religious citizens in multiple situations.

- If the state of Michigan addressed the crisis of lead in the water in Flint by providing money grants to entities to help them replace their lead water pipes, surely a house of worship would have an equal claim to assistance in avoiding lead poisoning and its effects on children.
- If a state provides funds to entities to remove asbestos from their buildings, surely houses of worship should not be categorically excluded from such a program. Religious persons have an interest in avoiding asbestos-related cancer that cannot be ignored or minimized.
- If New Jersey provides funds after a devastating hurricane to help tear down or stabilize damaged buildings, surely synagogues, churches, mosques, and temples should not be denied participation.

Finally, the free exercise right here is not defeated because the scrap tire grants are selective rather than automatic. Of course, neither petitioner nor any other applicant is entitled to receive a grant. But they are entitled to be considered without regard to their religious identity, or lack of it. Under religion-neutral criteria, petitioner would have received the grant; its application ranked fifth out of 44 submitted, and 14 were awarded grants. In an analogous context, this Court has emphasized that a state entity may allocate scarce funds based "on some acceptable neutral

principle," but it cannot use this scarcity to justify "viewpoint discrimination among private speakers." *Rosenberger v. Rector and Visitors of Univ. of Virginia.*, 515 U.S. 819, 835 (1995) (holding that university's exclusion of religious publication from student activity fee funding for student publications violated the Free Speech Clause). The same principle holds true for the fundamental constitutional right to be free of discrimination against one's religious status.[4]

The importance of safety and health benefits to the enjoyment of equal citizenship makes *McDaniel v. Paty*, *supra*, doubly relevant in this case. Under *McDaniel*, it is impermissible to condition a secular benefit or right on the relinquishing of a religious one. *McDaniel*, 435 U.S. at 626 (citing *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)). But that is precisely what the state has done here. If religious organizations in Missouri want a benefit crucial to providing children with safer playgrounds, they must relinquish the right to operate their schools and learning centers as church-related institutions. And if parents want their children to benefit from state assistance to assure their safety on the playground, they must abandon their constitutional right to send their

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[4] Moreover, like the safety and public welfare benefits endorsed in *Everson*, the benefits involved here are "separate and . . . indisputably marked off from the religious function" (*Everson*, 330 U.S. at 18). Therefore, as we discuss in part II, any Establishment Clause interest in excluding churches is minimal or non-existent. See pp. 21-24 *infra*.

children to a church-operated school (*Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

McDaniel is especially relevant because there the state imposed a religious condition on an individual's right to run for public office, a basic component of citizenship. See *Locke*, 540 U.S. at 720 (noting that in *McDaniel* the state withdrew from religious leaders "the right to participate in the political affairs of the community"). Similarly, here the state withdraws eligibility to receive a protection related to safety and health, the "cardinal civic responsibilities" of government. *Davis*, 553 U.S. at 341. To exclude persons attending church-operated schools from eligibility for a safety benefit strikes at their equal citizenship in the same way that excluding religious leaders from basic political participation struck at theirs.

II. THE EXCLUSION HERE CANNOT BE JUSTIFIED BY ANY "PLAY IN THE JOINTS" BETWEEN THE RELIGION CLAUSES.

The court below justified petitioner's exclusion from the scrap tire program as supposedly falling within the discretion government has within the Religion Clauses of the First Amendment. Pet. App. 12a n.3. The court relied on this Court's ruling in *Locke v. Davey*, 540 U.S. 712. But *Locke* does not control this case for two reasons. First and foremost, the discretion that government has with respect to religion is limited – particularly the discretion to single out religion for discriminatory treatment. And

for multiple additional reasons, *Locke* is far different from this case and easily distinguishable.

A. Government's "Play in the Joints" to Single Out Religion for Discriminatory Disabilities Should Be Very Limited.

This Court in *Locke* referred to the "play in the joints" between the two Religion Clauses: the idea that there is state action that is permitted by the Establishment Clause but not required by the Free Exercise Clause. 540 U.S. at 718-19. But this concept must be applied with caution.

The Religion Clauses of the First Amendment were never intended to give government substantial discretion with respect to religion. Indeed, the notion stands the First Amendment on its head: the Religion Clauses actually impose a two-fold restriction on government action, a restriction aimed at *limiting* government's power over religion. The spirit of the Religion Clauses was captured by one member of the First Congress during the debate over the provisions:

> As the rights of conscience are, in their nature, *of peculiar delicacy, and will little bear the gentlest touch of governmental hand*; and as many sects have concurred in opinion that they are not well secured under the present constitution, he said he was much in favor of adopting the words.

1 Annals of Cong. 757-58 (1789) (Joseph Gales ed., 1834) (statement of Daniel Carroll) (emphasis supplied).

Locke referred to the concept of "play in the joints" immediately after saying that the Establishment and Free Exercise Clauses "are frequently in tension." 540 U.S. at 718. And indeed, if the two clauses at their hearts conflict or point in different directions, then it is necessary to cut down the reach of one or both of them, or else the state could not operate at all.

But the two clauses are not conflicting; they are complementary. To interpret them as conflicting "is a mistake at the most fundamental level." Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn. L. Rev. 1047, 1088 (1996). It "imputes incoherence to the Framers," and it ignores the historical record: "The Religion Clauses were no compromise of conflicting interests, but the unified demand of the most vigorous advocates of religious liberty." *Id.*[5] The Religion Clauses, in fact, constitute two aspects of a single statement or principle about religion and government. Together the two clauses serve the goal of protecting the neutrality of government and the religious choices of individuals and communities.

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[5] See also Thomas C. Berg & Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 Tulsa L. Rev. 227, 245-46 (2004).

With that understanding, it makes perfect sense to say that a law discriminating against religious status – one singling out religious choices for a disability – is not required by the Establishment Clause *and* also violates the Free Exercise Clause. Or put differently, if a law discriminating against religion does not serve strong establishment values, it is also very likely to violate free exercise values.

There are a few instances in which the state needs discretion to create policy that interferes with religious choices. For example, the Free Exercise Clause permits the state discretion to burden religion when the burden is justified by a compelling interest. *Lukumi*, 508 U.S. at 531. There may also be discretion in some cases where the application of the constitutional principles at stake is ambiguous, so that either aspect of action may affect religious freedom. But in a case such as this one, involving the provision of religion-neutral safety and health benefits, there is no ambiguity in the application of Religion Clause principles. Exclusion from such benefits denies equal citizenship to families on the basis of their choice of religious schooling, and it discourages that choice by making it less attractive. And the exclusion of religious entities serves no significant Religion Clause purpose – as is shown by how much this exclusion differs from the one that the Court upheld in *Locke v. Davey*.

B. The Exclusion Here Is Entirely Different from the One Upheld in *Locke v. Davey*.

The holding in *Locke* is inapplicable to this case, especially in light of the very limited state discretion to discriminate against religious status. Missouri's exclusion of petitioner from safety benefits in this case differs in multiple ways from the condition on state scholarships upheld in *Locke*. As petitioner puts it, "This case is as far from *Locke* as one can conceive." Pet. Br. 11. Because the program in *Locke* excluded students majoring in "devotional theology," this Court rested its decision on the state's interest in avoiding funding the religious training of clergy. *Id.* at 721-23. Indeed, the Court said that was "the only issue" in the case. *Id.* at 722 n.5.

The first difference is that the exclusion in *Locke* targeted a "distinct category of instruction" – training to be a member of the clergy – that is "not fungible" with "training for secular professions." *Id.* at 721. By contrast, the state here has excluded petitioner from the benefit even though petitioner's relevant activity is comparable to those of nonreligious entities that receive the benefit. Church-operated schools such as petitioner's provide education and care to children just as their nonreligious counterparts do. Certainly, the activity of children on a playground is the same for religious and nonreligious schools alike, and the state's concern for children's safety on the playground is – and should be – the same for all. The state has thus targeted petitioner's "conduct because it is

undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. Petitioner was excluded solely because of its status as a religious institution (see *McDaniel*; *infra* pp. 4-7), not because its activity involved the "distinct category of instruction" involved in the religious training of clergy.

The majority in *Locke* also emphasized that Washington's exclusion of "devotional theology" majors left students many alternative means to include religion in their college studies. *Id.* at 724. Students could still attend pervasively religious institutions, take non-theology courses that incorporated religious perspectives, and even take devotional theology courses, as long as they did not major in devotional theology. *Id.* at 724-25 (finding that the program "goes a long way toward including religion in its benefits"). The Court held that the availability of religious options showed that the state was not hostile to religion (*id.*); the fact likely also contributed to the Court's conclusion that the burden in *Locke* was relatively mild (*id.* at 720). Here, in contrast, there is no alternative for petitioner or any other church in Missouri to pursue its program and simultaneously participate in a state program to improve playground safety. The state completely bars grants to a church or any entity, such as petitioner's preschool, operated by a church.

Finally, the Court in *Locke* held that avoiding state funding for the training of clergy was a "historic and substantial state interest," *id.* at 724, dating back to the early days of the Republic. *Id.* at 722-23.

"In fact," the Court said, "we can think of few areas in which a State's antiestablishment interests come more into play." *Id.* at 722.

In contrast, the antiestablishment interests here are minimal. The scrap tire grant provides no money for school instruction, educational materials, or teacher salaries. It simply provides financial assistance to install playground surfaces that increase safety of a playground facility. The equal inclusion of churches and their preschools in this program does not come close to violating the Establishment Clause under this Court's precedents. The benefit – recycled rubber playground surfaces – is not itself religious in content. See *Mitchell v. Helms*, 530 U.S. 793, 822-23 (2000) (plurality opinion of Thomas, J.). It is most unlikely to be used for religious purposes; the prospect is utterly speculative and, at best, *de minimis*. *Id.* at 861 (O'Connor, J., joined by Breyer, J., concurring in the judgment) (upholding aid where its use for religious purposes was "*de minimis* and therefore insufficient to affect the constitutional inquiry").

Finally, allowing persons using religious facilities to benefit from a safety program is extremely unlikely to provoke resentment or "divisiveness" along religious lines. *Van Orden v. Perry*, 545 U.S. 677, 703-04 (2005) (Breyer, J., concurring). Certainly the record shows no such spiteful reaction has occurred. But even if it did, it would not justify disqualifying organizations and persons from a core component of citizenship: government programs aimed at protecting children's safety. The disqualification here "exhibit[s]

a hostility toward religion that has no place in our Establishment Clause traditions." *Id.* at 704.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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April 21, 2016

APPENDIX

DETAILED STATEMENTS OF INTEREST OF *AMICI CURIAE*

Founded in 1961, the **Christian Legal Society** ("CLS") is an association of Christian attorneys, law students, and law professors, with attorney chapters nationwide and law student chapters at approximately 110 law schools. CLS's advocacy arm, the Center for Law and Religious Freedom, works to defend religious liberty and the sanctity of human life in the courts, legislatures, and the public square. Since 1981, CLS has filed briefs in most Religion Clause cases heard by this Court. Twice CLS has represented religious organizations before this Court when they have been excluded from a broadly available governmental program.

CLS believes that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected. Pluralism is advanced in this case by protecting the right of all Americans to participate in health and safety programs regardless of their religious status.

The **Anglican Church in North America** ("ACNA") unites some 100,000 Anglicans in nearly 1,000 congregations across the United States and Canada into a single Church. It is a Province in the Fellowship of Confessing Anglicans, initiated at the request of the Global Anglican Future Conference (GAFCon) and formally recognized by the GAFCon Primates – leaders of Anglican Churches representing

70 percent of active Anglicans globally. The ACNA is determined with God's help to maintain the doctrine, discipline, and worship of Christ as the Anglican Way has received them and to defend the God-given inalienable human right to free exercise of religion.

The **Christian Medical Association** ("CMA"), founded in 1931, provides a ministry and public voice for Christian healthcare professionals and students. With a current membership of approximately 17,000, CMA advocates for policies on healthcare issues, conducts overseas medical evangelism projects, provides doctors overseas with continuing medical education resources, and sponsors student ministries in over nine out of ten medical and dental schools. CMA members provide charitable care for needy patients domestically and overseas, regardless of the patients' beliefs. Members fully integrate their personal faith and professional practice, not separating their motivation to care for the poor and needy from their commitment to practicing according to faith-based moral standards.

Family Research Council is a non-profit organization located in Washington, D.C., that exists to develop and analyze governmental policies for consistency with traditional religious values, and believes in protecting the rights of all people to adhere to and pursue their religious beliefs. Integral to this freedom of religion is the freedom to organize into churches and religious organizations and to participate in the public life of the nation. Consequently, Family Research Council has a strong interest

in ensuring that religious organizations and churches are not treated differently by the government because of their religious nature or their values.

National Religious Broadcasters ("NRB") is a nonpartisan international association of Christian broadcasters and communicators united by purpose and message: to proclaim the Good News of eternal life through Jesus Christ; to transform culture through the application of sound biblical teaching; to advance biblical truth; to promote media excellence; and to defend free speech. NRB reaches every continent through Christian radio, television, internet, and other media arts.

NRB members hold deep-rooted beliefs that religious liberty is the cornerstone of a free society, and that we must protect those freedoms so that the transforming reality of Jesus Christ can reach hearts and minds the world over. NRB also works to protect access to the world's electronic and digital media, ensuring that the Gospel goes out unimpeded to reach the four corners of the earth.

The **Queens Federation of Churches**, was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of an equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations

participate in the Federation's ministry. The Queens Federation of Churches has appeared as *amicus curiae* previously in a variety of actions for the purpose of defending religious liberty.

RECORD AND BRIEFS.

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In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR, MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE STATE OF COLORADO AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The State of Colorado has an interest in this case because the Colorado State Board of Education and Colorado Department of Education are petitioners in another case pending before this Court that raises issues similar to, yet distinct from, those raised here. *See Colo. State Bd. of Educ. v. Taxpayers for Pub. Educ.* (No. 15-558). In *Colorado State Board of Education*, a group of plaintiffs challenged a school voucher program under a state constitutional provision prohibiting the use of "public fund[s] or moneys ... to help support or sustain any school ... controlled by any church or sectarian denomination." Colo. Const. art. IX, § 7. Applying this provision, the Colorado Supreme Court struck down the voucher program because, in its view, "facilitation of ... attendance [at private religious schools] necessarily constitutes aid to 'support or sustain' those schools." *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 470 (Colo. 2015). The court rejected the argument that *Locke v. Davey*, 540 U.S. 712 (2004), prohibits categorical discrimination against religion, concluding that state constitutions can be "far more restrictive than the Establishment Clause" in excluding religious institutions from public benefits programs. 351 P.3d at 474. This Court last considered *Colorado State Board of Education* during its February 19, 2016 conference and has not yet granted or denied certiorari.[1]

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[1] Two other parties filed their own petitions for certiorari in the same case, and those petitions have also not been granted or denied. *See Doyle v. Taxpayers for Pub. Educ.* (No. 15-556); *Douglas Cty. Sch. Dist. v. Taxpayers for Pub. Educ.* (No. 15-557).

Colorado joins the arguments made by the States of Nevada, *et al.*, in their amicus brief in support of Petitioner, but writes separately to describe its unique experience with Article IX, Section 7 of the Colorado Constitution and the manner in which the Colorado Supreme Court misapplied the First Amendment. *Colorado State Board of Education*, like this case, involves the use of a state "no-aid" provision to discriminate against religion. But because *Colorado State Board of Education* involves indirect payments as part of a voucher program—rather than, as here, the direct payment of state funds to churches—it sheds light on the full range of cases to which *Locke*, properly interpreted, logically must apply.

INTRODUCTION AND SUMMARY OF ARGUMENT

Beginning in the 1870s, a number of States enacted constitutional provisions barring public aid to "sectarian" institutions. *See Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) (plurality opinion). Both Missouri's and Colorado's Constitutions contain these so-called "no-aid" provisions, and, like Missouri's, Colorado's has recently been interpreted to require the categorical exclusion of religious institutions from a public benefits program. The program challenged in *Colorado State Board of Education* and the scrap tire program challenged here, however, have a significant difference: the one at issue here involves direct payments to a church, while the Colorado program is a form of so-called "indirect" aid.

The Choice Scholarship Program in Douglas County, Colorado. In 2011, the local school board in Douglas County, Colorado, approved the "Choice

Scholarship Program," which allowed parents of schoolchildren to offset with state funds the cost of tuition at qualifying private schools.[2] Scholarships were capped so that the State would spend the same or less for each child in the Program than it would on a child attending a public school.

To be eligible under the Program, private schools were required to meet certain criteria designed to ensure student achievement and growth. The Program was explicitly neutral toward religion, allowing schools to participate regardless of religious affiliation. Families participating in the Program selected which private schools their children would attend, and scholarship checks were sent to parents, who would endorse them to their selected schools. Thus, a private school (religious or not) received funds under the Program only if it was selected by a participating family; the State and the school district did not select schools to receive scholarship funds. Most private schools ultimately chosen by families were affiliated with churches or religious institutions; some were not.

Litigation Challenging the Program. The Program was challenged as unconstitutional under Article IX, Section 7 of the Colorado Constitution ("Section 7"), which provides:

> N[o] ... school district ... shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian

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[2] For a full description of the Program, see Pet. Cert. 5–6, *Colo. State Bd. of Educ.* (No. 15-558).

> purpose, or to help support or sustain any school ... controlled by any church or sectarian denomination whatsoever ....

Colo. Const. art. IX, § 7.

Over four years of litigation, the Program was alternately enjoined by a district court, upheld by a divided Colorado Court of Appeals, and enjoined once again in a fractured 3–1–3 decision by the Colorado Supreme Court. *See* Pet. App. 160c–253c, *Colo. State Bd. of Educ.* (No. 15-558) (district court decision); *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 356 P.3d 833 (Colo. App. 2013), *rev'd* 351 P.3d 461 (Colo. 2015). The controlling Colorado Supreme Court opinion recognized that under the Program, religious schools received funds only indirectly, based on participating families' private choices. It nonetheless found that the Program "aided" religion because religious schools were not categorically *excluded*: "[The Program] awards public money to students who may then use that money to pay for a religious education. In so doing, the [Program] aids religious institutions." 351 P.3d at 471.

Three Justices dissented, warning that the plurality's "breathtakingly broad interpretation" of Section 7 "would invalidate not only the [Program], but numerous other state programs that provide funds to students and their parents who in turn decide to use the funds to attend religious schools." *Id.* at 479 (Eid, J., concurring in part and dissenting in part). In the dissenting Justices' view, this interpretation of Section 7 was inconsistent with the First Amendment. *Id.* at 480–83 (Eid, J., concurring in part and dissenting in part).

***The Colorado Supreme Court's Misapplication of* Locke v. Davey.** The Colorado Supreme Court struck down the Choice Scholarship Program because it permitted public funds to be spent at religious institutions. Yet the Tenth Circuit—in a case striking down another Colorado scholarship program for *excluding* certain religious schools—has recognized that "the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support" would be contrary to the First Amendment. *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008).

Given the conflict between the state and federal courts in Colorado, it appears state policymakers are caught between either choosing which precedent to violate—state or federal—or abandoning public benefits programs that allow money to flow, even indirectly, to religious institutions.

This Court has noted that "[t]he government usually acts by spending money." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 843 (1995). Sometimes, as with Missouri's Scrap Tire program, this involves government directly selecting recipients of public funds. At other times, as with Colorado's Choice Scholarship Program, it involves indirect payments based on the private choices of citizens. In either case, judicial decisions requiring government to discriminate against religion in the distribution of public funds represent a departure from guiding First Amendment principles. Both the Colorado Supreme Court's decision in *Colorado State Board of Education* and the Eighth Circuit's decision in this case run contrary to the First Amendment and should be reversed.

ARGUMENT

I. Categorical discrimination against religious institutions in public benefits programs, whether direct or indirect, collides with this Court's First Amendment jurisprudence.

A. Under *Locke*, a bare desire to prohibit aid to religious entities is insufficient to justify religion-based distinctions in awarding public funds.

Federal law imposes an obligation on government, state and federal, not to discriminate against religion. A State may not "affirmatively oppos[e] or show[ ] hostility to religion," but must instead "maintain strict neutrality, neither aiding nor opposing religion." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963); *see also Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990) ("[G]overnment may not ... impose special disabilities on the basis of religious views or religious status ...."). Even if a State has a unique interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause," that interest "is limited by the Free Exercise Clause." *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *see also Mitchell*, 530 U.S. at 835 n.19 (plurality opinion) ("[T]o require exclusion of religious schools from [a generally available, neutral government] program would raise serious questions under the Free Exercise Clause."). Applying state no-aid provisions to categorically exclude religion from public benefits programs clashes with these important constitutional principles.

Locke v. Davey did not erode the fundamental principle of neutrality toward religion. There, the Court concluded that a State may create a greater distance between religion and government than is required by the two Religion Clauses because there is some "play in the joints" between them. 540 U.S. at 719. But the Court made clear that "play in the joints" does not give license to discriminate. The desire for greater separation is limited; it must be anchored to "historic and substantial state interest[s]." *Id.* at 725.

The identified state interest in *Locke*—an aversion to "funding the religious training of clergy"—was supported with a historical pedigree that reached back to "around the time of the founding." *Id.* at 722–23 & n.5. The Court concluded that this long-held interest justified denying a public scholarship to a student who planned to train at a private Christian college "for a lifetime of ministry ... as a church pastor." *Id.* at 717. Indeed, the Court could "think of few areas in which a State's antiestablishment interests come more into play" than the context of funding clergy with taxpayer dollars. *Id.* at 722.

At the same time, however, the majority opinion emphasized the narrowness of its holding: "[T]he *only* interest at issue here is the State's interest in not funding the religious training of clergy. Nothing in our opinion suggests that the State may justify any interest that its 'philosophical preference' commands." *Id.* at 722 n.5. Because the State had designed its scholarship program to "go[ ] a long way toward including religion in its benefits"—for example, "permit[ting] students to attend pervasively religious schools"—the First

Amendment's neutrality principle was satisfied. *Id.* at 724.

In contrast, the desire to categorically exclude religious institutions from playground resurfacing grants and public scholarship programs is not the kind of "historic and substantial" state interest *Locke* contemplated. The critical question is whether a "philosophical preference" for prohibiting all "aid" to religious institutions is within the "play in the joints" that *Locke* contemplated. The answer, based on other decisions of this Court, is no. *See, e.g.*, *id.* at 722 n.5; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–14 (2001) (holding that a State's interest in avoiding establishment of religion cannot justify barring a religious group from using school facilities); *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 16 (1947) (holding that a State "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation").

B. The principles of *Locke* do not depend on whether a public benefits program is direct or indirect.

In opposing certiorari in this case, the State of Missouri emphasized the difference between programs in which the government itself chooses the recipients of public funds and programs in which "the flow of public funds" depends on "parents' choice." Br. in Opp'n 3–6. This echoed the Eighth Circuit's decision below, which was based in part on the fact that Trinity Lutheran's inclusion in the scrap tire program would amount to

the "direct grant of public funds to [a] church[ ]." Pet. App. 10a. In contrast, both the Colorado Court of Appeals and the Colorado Supreme Court recognized that under the Douglas County voucher program, public funds "make their way to private schools with religious affiliation by means of personal choices of students' parents." *Taxpayers for Pub. Educ.*, 356 P.3d at 851; *see also* 351 P.3d at 470 (noting that the voucher program "does not explicitly funnel money directly to religious schools").

Certainly some direct aid to churches may implicate Establishment Clause concerns. *See Rosenberger*, 515 U.S. at 842. But the Eighth Circuit was wrong to conclude that direct funding, in the absence of any "historic and substantial" antiestablishment interest, qualifies as a "hallmark[ ] of an 'established' religion." Pet. App. 10a (quoting *Locke*, 540 U.S. at 722). Providing funds to a religious entity for *plainly nonreligious functions*—such as building a safe playground surface—bears no relation to "establishing" a state religion.

Evenhanded government support of these secular functions, in contrast to publicly funding the "essentially religious endeavor" at issue in *Locke*, 540 U.S. at 721, does not infringe any legitimate antiestablishment interest. As the dissenting justices of the Colorado Supreme Court noted, even indirect aid can be vital to the operation of religious institutions, which rely on "state-paid infrastructure" such as "roads, bridges, and sidewalks" "to operate their institutions." *Taxpayers for Pub. Educ.*, 351 P.3d at 480 (Eid, J., concurring in part and dissenting in part). In either case, direct or indirect, there is no legitimate

justification for excluding religious entities from such broad-based government programs. Under *Locke*, the distinction between direct and indirect public benefits programs cannot be determinative. A "no-aid" principle, when applied to categorically discriminate, is simply inadequate to justify a departure from the important constitutional principle of neutrality toward religion.

II. States frequently coordinate with religious entities through both direct and indirect public benefits programs.

Requiring categorical discrimination against religious organizations could disrupt many public-private partnerships and public benefits programs in many states. Dissenting judges in both the Colorado Supreme Court and the Eighth Circuit highlighted the potential breadth of a no-aid principle unbounded by the First Amendment. In Colorado, Justice Eid noted that "any program that provides an incidental benefit to certain schools—for example, programs for public infrastructure and safety—will be constitutionally suspect" if the no-aid doctrine is taken to its logical limit and left unconstrained by *Locke*. *Taxpayers for Pub. Educ.*, 351 P.3d at 483 (Eid, J., concurring in part and dissenting in part). This would "invalidate the use of public funds to build roads, bridges, and sidewalks adjacent to such schools, as the schools ... 'rely on' state-paid infrastructure to operate their institutions." *Id.* at 479–80 (Eid, J., concurring in part and dissenting in part). Similarly, in the Eighth Circuit, Judge Gruender noted in dissent that "[i]f giving the Learning Center a playground-surfacing grant raises a substantial antiestablishment concern, the same can be

said for virtually all government aid to the Learning Center, no matter how far removed from religion that aid may be." Pet. App. 29a (Gruender, J., concurring in part and dissenting in part).

At its extremes, this could include basic government programs, such as "police, fire, and rescue service," Br. for Pet'r 37, or public infrastructure like "roads, bridges, and sidewalks," *Taxpayers for Pub. Educ.*, 351 P.3d at 480 (Eid, J., concurring in part and dissenting in part). But even assuming no-aid provisions would not be read so expansively, decisions like the one below could implicate "subsidies for textbooks and school transportation; tax credits for scholarships; grants for construction projects; [and] funding for rehabilitation centers"—not to mention innovative, environmentally friendly programs like the playground resurfacing subsidy at issue in this case. Reply Br. of Pet'rs at 11 (quoting Amicus Br. of Ass'n of Christian Sch. Int'l & Lutheran Church—Missouri Synod at 16).

In Colorado, many public-private partnerships include religious institutions. The Colorado Preschool Program uses public funds to provide free preschool to children at risk of academic failure and allows school districts to contract with religious schools to provide preschool services. *See* Colo. Rev. Stat. §§ 22-28-103(2), 26-6-102(1.5). Another preschool program, administered and funded with public dollars by the City of Denver, includes dozens of religious institutions on its list of approved providers, including Catholic, Lutheran, and Hebrew schools. *See Taxpayers for Pub. Educ.*, 351 P.3d at 483 (Eid, J., concurring in part and dissenting in part) (discussing the Denver Preschool Program). Outside of the arena of education, Colorado

relies on religious institutions to provide a wide variety of public services—from youth programs,[3] to family counseling and support,[4] to refugee services,[5] to healthcare.[6]

States like Colorado choose to channel public funds to these institutions, either directly or through the private choices of its citizens, not to single out religion for special treatment but to ensure that those in need are served by competent, passionate providers and that the social safety net is robust. This Court should make clear that these longstanding private-public

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[3] *See, e.g.*, Colo. Rev. Stat. §§ 26-6.8-101 to -106 (describing the Tony Grampsas youth services program); Colo. Dep't of Human Servs., Tony Grampsas Youth Services Program 2015-15 Grantees, http://tgys.colostate.edu/2014-15%20Grantee%20Program%20Descriptions.pdf (listing grantees under the program, including "Catholic Charities of the Diocese of Pueblo" and "Colorado Seminary").

[4] *See, e.g.*, Colo. Rev. Stat. § 26-18-105 (describing family resource center grants); Press Release, Colo. Dep't of Human Servs., New Family Support Services Grants Expand Capacity in Family Resource Centers (Mar. 10, 2016), http://bit.ly/1VzowX5 (listing "Catholic Charities Archdiocese of Central Colorado" and "Catholic Charities Archdiocese of Pueblo" as grant recipients).

[5] *See* Colo. Dep't of Human Servs., *Denver's Office of Immigrant and Refugee Affairs offers mini-grants to connect communities and new arrivals* (Mar. 24, 2016), http://bit.ly/1qV832M (listing "[f]aith based organizations" as eligible applicants for refugee project funding).

[6] *See, e.g.*, *Contract Awards: Colorado Department of Human Services Awards Contract for Outpatient, Inpatient Medical Services to Catholic Health Initiatives*, US Fed News, Apr. 24, 2010.

partnerships cannot be attacked solely because public money flows to religious institutions. The First Amendment does not countenance categorical discrimination against religion in the distribution of public benefits. A bare "no-aid" preference is insufficient to override the First Amendment's principle of religious neutrality.

CONCLUSION

The decision of the Eighth Circuit should be reversed.

Respectfully submitted,

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TRINITY LUTHERAN CHURCH OF COLUMBIA INC.,
PETITIONER

v.

SARA PARKER PAULEY, DIRECTOR OF THE MISSOURI DEPARTMENT OF NATURAL RESOURCES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES, ASSOCIATION OF CATHOLIC COLLEGES AND UNIVERSITIES, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AND SEVENTEEN INDIVIDUAL RELIGIOUS COLLEGES AND UNIVERSITIES SUPPORTING PETITIONER

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QUESTION PRESENTED

Does the exclusion of religious institutions from otherwise generally available government aid violate the Free Exercise and Equal Protection Clauses?

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

At first blush, this may appear to be a case about the demands of the First and Fourteenth Amendments in the narrow context of religious primary and secondary education. After all, the petitioner is a church that sought (limited) state assistance in connection with its school playground. And the denial of that assistance was based on a state law—one of many Blaine Amendments adopted in various states in the late 1800s and early 1900s—designed precisely to thwart public assistance for Catholic primary and secondary schools.

For two reasons, though, the resolution of this case has substantial implications for American religious higher education, represented here by three *amici* associations that collectively represent hundreds of U.S. religious colleges and universities, and by a number of individual institutions, all described in the Appendix.[2] First, whatever principle this Court applies in deter-

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[1] No one other than *amici*, their members and counsel authored any part of this brief or made a contribution to fund its preparation or submission. Counsel for all parties have consented to the filing of this brief in communications on file with the Clerk.

[2] The associational *amici* are: The Association of Catholic Colleges and Universities, The Council for Christian Colleges and Universities and The General Conference of Seventh-day Adventists. The individual *amici* are: Azusa Pacific University, Biola University, Brigham Young University, Brigham Young University-Hawaii, Brigham Young University-Idaho, Loma Linda University, Liberty University, The University of Notre Dame, Oklahoma Christian University, Oklahoma Wesleyan University, Oral Roberts University, Patrick Henry College, Regent University, Southern Virginia University, Union University, William Jessup University and Wheaton College.

mining whether Missouri has violated the federal Constitution in denying the assistance at issue here will likewise apply to disputes about governments' ability to discriminate against religious colleges and universities in the allocation of myriad forms of government assistance. Second, on a variety of topics, there exists in today's society an apparently escalating conflict between religious and secular norms, combined with a reduced cultural commitment to neutrality and pluralism. That dynamic creates a heightened risk that, as with the Blaine amendments of yesteryear, those opposed to some of the values widely embraced by today's religious colleges and universities will seek to exclude them from a variety of governmental programs—including some that are critical to these institutions' ability to carry out their educational missions.

That risk to religious higher education is made even more potent by a common misinterpretation of *Locke* v. *Davey*, 540 U.S. 712 (2004). In holding that a state could exclude ministerial training from a generally available scholarship program without running afoul of the First and Fourteenth Amendments, *Locke* reasoned that the religious discrimination at issue there was justified by a long-standing tradition—going back to the founding era—of avoiding governmental funding of ministerial training. Unfortunately, as this case illustrates, *Locke* has been misunderstood by some courts and governments as authorizing more *general* discrimination against religious institutions in government assistance or contracts. And that mistaken reading of *Locke* appears to underlie a number of recent decisions by government functionaries excluding or threatening to exclude religious institutions—including religious colleges—from otherwise generally available government programs.

Only this Court can re-establish *Locke's* narrow scope and thus protect religious institutions of all kinds—including colleges and universities—from the kinds of discriminatory policies approved in the decision below and others like it. And the Court can do so by reaffirming a neutrality principle, consistent with *Locke,* forbidding religious discrimination in the allocation of government benefits and contracts in all but the narrowest of circumstances.

STATEMENT

This case presents a classic example of discrimination against a religious institution in the allocation of government benefits or contracts.

1. The Learning Center, a preschool owned by petitioner Trinity Lutheran Church, applied for state funding to purchase recycled tires for resurfacing a playground. Pet. App. 97a-99a. In so doing, petitioner identified the numerous secular benefits the resurfacing would provide to the preschoolers who use the playground. Pet. Cert. 5-7; Pet. Br. 3-7. Petitioner applied for funding through a competitive process to The Missouri Department of Natural Resources (DNR). Pet. Cert. 7; Pet. Br. 6. But invoking the Missouri Constitution, the DNR nonetheless denied petitioner's application solely because petitioner is a church rather than a secular organization.

2. Missouri's Constitution contains a "Blaine Amendment," which forbids government funding to "aid . . . any church, sect, or denomination of religion." Mo. Const. Art. I § 7. The original effect—and apparent goal[3]—of such Blaine Amendments was to promote

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[3] See generally Steven K. Green, *The Blaine Amendment Reconsidered,* 36 Am. J. Legal Hist. 38 (1992).

the Protestant faith through public schooling while denying funding for Catholic schools.

But this case is not about government favoring one religion, like Protestants. Rather, in this case DNR understood Missouri's Blaine Amendment as forcing DNR to withhold funding that is widely available to secular preschools from preschools run by churches of *any* faith. See Pet. Resp. 1-2; Pet. App. 153a.

3. Trinity Lutheran sued DNR, asserting claims under the Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause. See Pet. App. 116a (complaint). The district court dismissed these claims based on this Court's 2004 decision in *Locke* v. *Davey*, 540 U.S. 712 (2004). Pet. App. 34a, 51a-52a. The district court claimed petitioner's request presented "antiestablishment concerns . . . at least comparable to those relied on by the Court in *Locke*." Pet. App. 54a. The court acknowledged those concerns did not necessarily rise to an Establishment Clause violation. But it nevertheless claimed they were sufficient to justify excluding petitioner from participating in the grant program. Pet. App. 56a

4. A majority of the Eighth Circuit affirmed. Pet. App. 1a, 5a-12a. Judge Gruender dissented, finding that the antiestablishment interests were near their pinnacle in *Locke*, and that the antiestablishment interests in this case were not as strong. Pet. App. 28a. He doubted that the *Locke* Court would have considered "a state's interest in not rubberizing a playground surface with recycled tires" as a strong Establishment Clause interest. Pet. App. 29a. While acknowledging that the precise boundaries of *Locke* are "far from clear," he concluded that the district court should not have dismissed petitioner's claims. Pet App. 30a-31a.

SUMMARY OF ARGUMENT

I. The decisions below—and others like them around the country—represent a serious and even existential threat to U.S. religious higher education. For if the church in this case can be discriminated against based on its religious character, so also can a religious college or university be discriminated against in the allocation of government-related benefits that are critical to its success—such as student loans and grants, tax exemptions, accreditations and research contracts.

The resulting weakening of religious higher education would be an enormous loss. As Congress has recognized, religious colleges provide unique social benefits. Beyond academic excellence, these institutions offer students superior opportunities to integrate community service into their educations, to enjoy the physical and emotional safety that generally prevail in communities bound together by a common religious ethic, and to learn in an atmosphere of greater philosophical and political diversity than that offered in most secular institutions. See, *e.g.*, 154 Cong. Rec. H7658-03 (2008) (community service); 20 U.S.C. § 1011a(a)(2) (diversity). Accordingly, the mere existence of religious colleges and universities adds valuable diversity to higher education in general. See *id.*

Unfortunately, in addition to the decisions in this case, other courts and governments have interpreted this Court's decision in *Locke* v. *Davey* as a license to discriminate against religious educational institutions based on their religious character. For example, the Kentucky Supreme Court recently relied upon *Locke* in upholding the application of Kentucky's Blaine Amendment to prohibit tax-exempt bond financing of a pharmacy school at a religious college. *University of*

the Cumberlands v. *Pennybacker*, 308 S.W.3d 668 (Ky. 2010). The court claimed that, under *Locke*, governments can rely upon "antiestablishment interests" to prohibit *any* governmental financial benefit to religious colleges—even where such a prohibition results in rank religious discrimination. *Id.* at 680. And of course, the denial of such generally available benefits harms religious higher education by putting religious institutions at a substantial disadvantage compared to their secular counterparts.

II. To prevent further harm to religious higher education, *amici* respectfully ask this Court to clarify that *Locke* is not, after all, an open invitation to discriminate against religious institutions based on their religious character. Or, as Judge Gruender put it, "*Locke* did not leave states"—or other governmental or quasi-governmental entities—"with unfettered discretion to exclude the religious from generally available public benefits." Pet. App. 26a.

Instead, as a general rule, the proper standard for adjudicating claims of the sort raised here—and in *University of the Cumberlands*—is strict neutrality between religious and secular groups. Governments can depart from this general rule and discriminate against religious institutions *only* when such discrimination falls squarely within a well-established tradition going all the way back to the adoption of the First Amendment, as the Court held it did in *Locke*. Otherwise, the First and Fourteenth Amendments require that religious schools—like petitioner and *amici*—be treated no worse than their secular counterparts. As this Court put it in *Employment Division* v. *Smith*, 494 U.S. 872, 877 (1990), "[t]he government may not . . . impose special disabilities on the basis of religious views *or* religious status."

ARGUMENT

I. Religious Colleges And Universities, Which Benefit Society In Numerous Ways, Would Suffer Serious Harm Under The Misinterpretation Of *Locke* Embraced By The Courts Below And Other Courts And Agencies.

The Court's decision in this case is exceptionally important, not just to the development of constitutional doctrine, but also for its practical impact on religious colleges and universities throughout the Nation. In numerous ways, these institutions benefit American higher education and, hence, American society. But the lower court's erroneous and overbroad interpretation of *Locke*—an interpretation similar to those adopted by other courts and government agencies—would justify governmental discrimination against religious colleges across a range of important matters. Such discrimination would seriously weaken those colleges, perhaps driving some out of higher education altogether, and would thereby threaten the many benefits they provide.

A. Religious colleges and universities bring unique benefits – including much-needed diversity – to American higher education.

Religious institutions of higher education provide unique benefits to American society. To be sure, they offer students scholastic opportunities competitive with (and often superior to) those at non-religious schools, whether private or public. But beyond academic excellence, religious colleges and universities offer students advantages that often are not as readily available in secular institutions. Three of those are (1) the opportunity for students to naturally integrate community service into their education; (2) the greater

physical safety offered by communities bound together by a common religious ethic; and (3) a broader diversity of philosophical and political perspectives among professors and students.

1. Congress recognized the value of religious colleges and universities in enabling students to integrate community service into their educational pursuits when it enacted the Higher Education Opportunity Act of 2008, Public Law 110-315 (2008). Among other things, that law requires that accrediting bodies "respect the . . . religious missions" of colleges and universities. *Id.* Moreover, noting that "[t]he time to recognize and encourage an increased commitment to public service is now," the House Report on that Act specifically mentioned as one of its policy rationales the increasing number of students at religious colleges who serve religious missions or perform other kinds of service. See 154 Cong. Rec. H7658-03 (2008). That comment reflects the reality that creating enhanced opportunities for community service is one key respect in which those colleges contribute to the common good.[4]

Nor is it an accident that religious colleges tend to foster community service. Students and professors in these institutions are far more likely to accept the in-

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[4] Indeed, many state and federal programs encourage college students to provide such service. See, *e.g.*, Corp. for Nat'l and Cmty. Serv., *National Service in Your State (2014-2015)*, http://www.nationalservice.gov/impact-our-nation/state-profiles (providing information for national and state service initiatives focused on incentivizing and promoting young adults between the ages of eighteen to twenty-four to combine education and community outreach).

junctions in their foundational religious texts, traditions and teachings to take care of the foreigner, the poor and the needy.[5] And they are more likely to embrace the challenging principle that the value of one's life is measured not primarily by what one achieves in a secular occupation, but by how well one serves others.[6]

Thus, for instance, a sociology major in a Jewish college might find inspiration in the Book of Exodus to study and address the plight of refugees from war-torn lands.[7] Or a student in a Muslim school might be led by the Quran to investigate the factors influencing immigration, and then look for opportunities to serve local immigrants.[8] Or a Catholic law student might be moved by the New Testament to provide *pro bono* assistance to unwed mothers or crisis pregnancy centers.[9]

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[5] See, *e.g.*, Deuteronomy 10:18-19 ("He executes justice for the fatherless and the widow, and loves the sojourner, giving him food and clothing. Love the sojourner, therefore; for you were sojourners in the land of Egypt.").

[6] See, *e.g.*, St. John of the Cross, *Dichos* 64 ("At the evening of life, we shall be judged on our love."), quoted in *Catechism of the Catholic Church*, art. 1022.

[7] See, *e.g.*, Exodus 22:21 ("Thou shalt neither vex a stranger, nor oppress him: for ye were strangers in the land of Egypt.").

[8] See, *e.g.*, Quran 17:26 ("Give ... to the needy and the wayfarers.").

[9] See, *e.g.*, Matthew 25:35-40 (Jesus's command to treat "the least of these" as if they were Jesus himself); James 1:27 ("Religion that is pure and undefiled before God and the Father is this: to visit orphans and widows in their affliction, and to keep oneself unstained from the world.").

In fact, studies show that students at religious colleges tend to spend more of their time in community service than students at non-religious colleges, public or private.[10] Students at such colleges frequently take time off from their educations for domestic or overseas public service,[11] thanks in part to institutional policies and accommodations designed to encourage such service.[12] It is also common for students who don't serve

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[10] See Elizabeth Weiss Ozorak, *Love of God and Neighbor: Religion and Volunteer Service Among College Students*, 44 Rev. of Religious Research 285, 289-91 (2003) (college students were far more likely to engage in volunteer activity when they were actively religious and participated in religious worship); Thomas A. Trozzolo & Jay W. Brandenberger, *Religious Commitment and Prosocial Behavior: A Study of Undergraduates at the University of Notre Dame*, 2 Center for Social Concerns 1, 3-4 (2001) (positive correlation between religious university and prosocial behavior, including volunteer work).

[11] George S. Wood, *Faith Development of Christian College Students Engaged in a One-Month Study Abroad Mission Trip*, Doctoral Dissertations of Ball State University (1999); See Kathryn A. Tuttle, *The Effects of Short-term Mission Experienced on College Students' Spiritual Growth and Maturity*, 4NS Christian Education Journal 123 (2000) (Series 2); Adventures, https://www.adventures.org/trips/?prg=passport (last visited April 15, 2016); Orphan Outreach, http://www.orphanoutreach.co/mission-trips/short-term-mission-trips.asp (last visited April 15, 2016); Brigham Young University, *Percentage of Students who Have Served Missions*, http://yfacts.byu.edu/Article?id=264 (last visited April 15, 2016).

[12] See La Sierra University Student Missions, https://lasierra.edu/missions/ (last visited April 15, 2016); Office of Campus Ministries, Andrews University *Missions*, https://www.andrews.edu/cm/change/missions/about/ (last visited April 15, 2016); Brigham Young University, *Mission Deferments*, https://admissions.byu.edu/mission-deferments (last visited April 18, 2016).

traditional missions to volunteer in foreign countries while studying abroad.[13]

All such humanitarian work serves not only to benefit specific religious groups, but also to reduce cultural divides between nations and religions. That too benefits both students and the world community.

2. Religious colleges and universities also provide some of the safest places for learning and academic inquiry. For instance, in a recent study of campus safety, Regent University, Summit University and Brigham Young University—all private, religious institutions—were named the safest in the nation.[14] Indeed, of the top twenty-five safest universities, eighteen (or 72 percent) are religious.[15] And colleges classi-

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[13] See R. Michael Paige, Gerald W. Fry, Elizabeth M. Stallman, Jasmina Josic, and Jae-Eun Jon, *Study Aboard for Global Engagement: The Long Term Impact of Mobility Experiences*, 20 Intercultural Education 529 (2009); Global Volunteers, https://globalvolunteers.org/students/ (last visited April 15, 2016); Megan Heise, *Tips for College Students Before, During, and After Volunteering Abroad*, Go Overseas (July 16, 2013), http://www.gooverseas.com/blog/tips-college-students-volunteer-abroad; Princeton Review, *The Gap Year Experience: A Life-Changing Opportunity*, http://www.princetonreview.com/study-abroad/college-abroad/gap-year (last visited April 20, 2016).

[14] Tanya Loudenback, *The 25 safest college campuses in America*, Business Insider (Jan. 12, 2016), available at: http://www.businessinsider.com/safest-college-campuses-in-america-2016-1.

[15] *Id. see also* Niche, *Safest College Campuses*, available at: https://colleges.niche.com/rankings/safest-colleges/ (another permutation of same rankings). The sources for these numbers include Department of Education data reported under the Clery Act, as well as students' self-reported perceptions of safety. *Id.* (under the link "[s]ee how this rating was calculated").

fied as "most religious" consistently report much lower rates of sexual assault than the national average.[16]

Accordingly, for students and parents concerned about physical safety, religious colleges and universities can be a very attractive option.[17] And the mere existence of such options in the market for higher education helps ensure that other institutions place greater emphasis on student safety.

3. Perhaps most importantly, religious colleges contribute substantially to the diversity of American higher education. In most religious traditions, the call to faith is a challenge to think and live differently from the rest of society. From the Islamic command to "[b]e in the world as if you were a stranger or traveler" to Jesus' command that his disciples be "a light to the world,"[18] people of faith are encouraged to transcend

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[16] EDSmart, College Sexual Assault Statistics of Top Ranked Schools 2015 http://www.edsmart.org/college-sexual-assault-statistics-top-ranked-schools/#stats (last visited April 20, 2016).

[17] Indeed, for these and other reasons, even though there are few American colleges in the Islamic faith tradition, Muslim students are increasingly flocking to universities run by other faiths. See, *e.g.*, Richard Pérez-Peña, *Muslims From Abroad Are Thriving in Catholic Colleges*, N.Y. Times (Sep. 2, 2012), available at: http://www.nytimes.com/2012/09/03/education/muslims-enroll-at-catholic-colleges-in-growing-numbers.html (noting fondness of Muslim students for "the prevalence of . . . single-sex dorms" and "a place where talk of religious beliefs and adherence to a religious code are accepted and even encouraged").

[18] See also Bonnie Louise Kuchler, *One Heart: Universal Wisdom from the World's Scriptures* 110 (2003) (citing a hadith of an Islamic scholar that encourages to "[b]e in the world as if you were a stranger or traveler"); Avi Lazerson, *Holiness and Judaism*, Jewish Magazine (2001) (online publication), http://www.jew-

the cultures in which they live. Throughout the Nation's history, this effort to live differently has suffused numerous religious schools—compelling them, for example, to help lead the fight against slavery and racial discrimination.[19] Thus, it should come as no surprise

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ishmag.com/39mag/holy/ holy.htm (interpreting the Torah to direct Jews to "liv[e] in this world, marrying, procreating, working and at the same time not to be affected by the daily worldly occurrences"); Matthew 5:14-15 (Jesus commands his followers to be a "light" to the world); David Peterson, *Worship and Ethics in Romans 12*, 44 Tyndale Bulletin 271, 282 (1993) http://www.tyndalehouse.com/TynBul/Library/TynBull_1993_44_2_04_Peterson_WorshipInRom12.pdf (interpreting Romans 12:2 to direct Christians to "yield to the power of God and his norms, rather than to the influence of this age and its norms."); Chris Wright, *What Difference Does Religion Make?* 14 (2002) (interpreting Dhammapada 171 to instruct Buddhists that the "way to end unhappiness and suffering is to stop clinging to things [of the world]").

[19] For example, Yale College, then a religious school, produced numerous prominent abolitionists. Yale, Slavery, and Abolition, *The Story of Yale Abolitionists* (last visited April 18, 2016), http://www.yaleslavery.org/Abolitionists/abolit.html; see also Bertram Wyatt-Brown, *American Abolitionism and Religion*, Divining America: National Humanities Center (last visited April 18, 2016), http://nationalhumanitiescenter.org/tserve/nineteen/nkeyinfo/amabrel.htm (detailing the involvement of religion generally in the fight against slavery). Later, most historically black colleges and universities were established by churches. Inspired by their religious beliefs, current and former students of these colleges (including Reverend Martin Luther King, Jr.) played a critical role in the civil rights movement. *Id.*; see also Rich Tucker, *How MLK's Faith Influenced His Public Life*, The Daily Signal (Jan. 20, 2014), http://dailysignal.com/2014/01/20/mlks-faith-influenced-public-life/; Jill Silos-Rooney, *The Civil Rights Movement, HBCUs, and You*, HBCU Lifestyle (Feb. 1, 2014), http://hbculifestyle.com/hbcu-civil-rights-movement.

that educational institutions founded and run by religious groups offer perspectives and emphases that differ, sometimes dramatically, from those offered by other educational institutions.

One illustration of that diversity is found in studies of professors' political affiliations and views. Overwhelmingly, most professors who teach in colleges and universities consider themselves politically "liberal."[20] And in one study of political donations by professors affiliated with some 150 colleges and universities, only nine were classified as having an average donation rating at or to the "right" of what the study deemed the political center.[21] Each of these nine more centrist

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Today, religious schools continue to fight modern-day slavery in foreign lands. See, *e.g.*, Giulia Segreti, *Religious leaders in rare union with pledge to fight slavery*, Financial Times (Dec. 3, 2014 10:18 AM), http://www.ft.com/cms/s/0/438d6d48-7ac4-11e4-b630-00144feabdc0.html; Amy Harrison, *BYU students fight global issue of human trafficking*, The Daily Universe (Jan. 15, 2013), http://universe.byu.edu/2013/01/15/byu-students-fight-global-issue-of-human-trafficking1.

[20] Cf., *e.g.*, James C. Phillips, *Why Are There So Few Conservatives and Libertarians in Legal Academia? An Empirical Explanation of Three Hypothesis*, 39 Harv. J. L. Pub. Pol. 153, 154 nn. 2-4 and accompanying text (2016) (documenting overwhelmingly liberal affiliation of professors in social science and law); Pascal-Emmanuel Gobry, *How academia's liberal bias is killing social science*, The Week (Dec. 17, 2014), http://theweek.com/article/index/273736/how-academiasliberal-bias-is-killing-social-science.

[21] Crowdpac.com, *How liberal or conservative is your university?*, available at: https://www.crowdpac.com/games/lookup/universities (last visited April 20, 2016). For a reference point, the scale utilized by the study suggests that all but two of 334 cataloged Republican candidates for federal office are right of political center, and all 263 Democratic candidates are left of political center.

schools—as measured by their professors' political views—has some religious affiliation. On the other hand, Brandeis University, which also boasts a long religious heritage, attracts professors whose donations are, on average, the 23rd most liberal of the collection of 150 colleges.[22] In short, religious colleges and universities have value in part because they tend to attract professors and students from across the political spectrum, rather than from one part of it.

Because of this reality, religious colleges are more likely than most to provide students extensive exposure to the full range of political views. And that includes not only the more "conservative" views that, for whatever reason, are missing in many non-religious institutions, but also more progressive views, leavened by religious perspectives.

The diversity that religious colleges add has long been understood and valued by Congress. As it said in the Higher Education Opportunity Act, "[i]t is the sense of Congress that [] the diversity of institutions and educational missions is one of the key strengths of American higher education." 20 U.S.C. § 1011a(a)(2). Consistent with that view, the provision further urged that "individual institutions of higher education have different missions and each institution should design its academic program in accordance with its educational goals." *Id.*

In short, just as this Court has recognized that racial diversity and other forms of diversity are valuable

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See Crowdpac.com, *Candidates*, available at https://www.crowdpac.com/candidates (last visited April 20, 2016).

[22] Crowdpac.com, *Brandeis University*, available at: https://www.crowdpac.com/games/lookup/universities? name= Brandeis%20University.

in any given educational institution, see *Grutter* v. *Bollinger*, 539 U.S. 306, 343 (2003), Congress has recognized that diversity *among* educational institutions is valuable in higher education as a whole.

It is not difficult to see how these unique benefits offered by religious colleges and universities could be gravely imperiled by the overbroad view of *Locke* espoused by the lower courts in this case. That mistaken interpretation could justify governments at any level in excluding religious institutions from otherwise available benefits such as student loan programs. It could even allow accrediting agencies to disqualify religious institutions based on their unique religious views. Such unfair discrimination, grounded in a misreading of *Locke*, would place those institutions at a severe disadvantage compared to their secular counterparts, eroding the needed diversity that these institutions bring to American higher education. And this is why *amici* are deeply concerned about the lower courts' decisions in this case.

B. Recent misinterpretations of *Locke* and related Establishment Clause precedents would permit governmental discrimination against religious colleges across a range of important matters.

The Eighth Circuit is not alone in misinterpreting *Locke*. In cases arising out of the inevitable interactions between government and religious schools, other courts, governments and agencies have also read *Locke* far too broadly, as countenancing general discrimination against religious institutions in access to otherwise generally available public benefits and contracts.

1. To succeed in their missions, religious universities and colleges must regularly interact with governments at every level. Indeed, many of the *essential* aspects of operating any school of higher education—such as obtaining necessary permits, becoming and remaining accredited, or finding loans for students—are regulated in whole or in part by governmental bodies.[23] Such regulation also governs financial and other benefits such as academic recognition and benefits paid with taxpayer dollars.[24] And of course, religious colleges are subject to other regulations applicable to colleges and universities generally—such as the federal Clery Act, which requires all colleges to report many details regarding on-campus crime,[25] and state and local environmental regulations.[26]

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[23] See, *e.g.* Washington State Dept. of Health, *Food Worker Card*, available at: http://www.doh.wa.gov/CommunityandEnvironment/Food/FoodWorkerandIndustry/FoodWorkerCard (all workers must have food permits); Department of Education, *Overview of Accreditation in the United States*, http://www2.ed.gov/admins/finaid/accred/accreditation.html#Overview (last visited April 18, 2016); SFGate, Feds take over student loan program from banks, (Mar. 30 2010), available at: http://www.sfgate.com/business/networth/article/Feds-take-over-student-loan-program-from-banks-3193888.php.

[24] See, *e.g.*, Federal Student Aid, *Federal Pell Grants*, available at: https://studentaid.ed.gov/sa/types/grants-scholarships/pell. And in order to receive Title IV funds, schools must sign a Program Participation Agreement. 34 C.F.R. § 668.14. In addition, schools must report survey date to the Integrated Postsecondary Education Data System (IPEDS). See IPEDS, *Form, Instructions, FAQs, Narrative Edits and Import Specifications*, available at: https://surveys.nces.ed.gov/ipeds/visresults.aspx.

[25] 20 U.S.C. § 1092 (f).

[26] See, *e.g.*, Cal. Code Regs tit. 24 (containing building codes).

These realities make the overbroad reading of *Locke* by the court below and others highly dangerous to religious schools. Such a reading offers a blueprint for governments to use Blaine Amendments or similar laws to deny benefits or even necessary approvals to religious colleges and universities—either because they are religious, or because they adhere to tenets with which the governmental bodies disagree.[27]

2. One area of immediate concern to many religious colleges is the tax-exempt bond financing that is generally available to institutions of higher education. Expressly relying on *Locke*, the Kentucky Supreme Court recently upheld the application of a Blaine Amendment to prohibit tax-exempt bond financing of a pharmacy school at a religious college. *University of the Cumberlands* v. *Pennybacker*, 308 S.W.3d 668 (Ky. 2010) . The Court claimed that "antiestablishment interests" in prohibiting *any* funding to religious colleges are akin to the interests regarding the hiring of clergy in *Locke*. *Id.* at 680. And, much like the lower courts in this case, the Kentucky Supreme Court concluded that the financial benefit inherent in tax-exempt financing violated that state's Blaine Amendment, and that this discrimination against a religious college was allowed by *Locke*.

Such an extension of *Locke* allows local governments—including courts—to penalize religious colleges simply for being religious. It is thus a formidable

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[27] This is not to suggest that all Blaine Amendments can or should be interpreted to ban financial aid—or aid of any sort—to religious schools. But the same constitutional interpretation that would enable Missouri to use a Blaine Amendment to deny funding for using recycled tires to refurbish a playground could likely be used to allow any government to deny to religious colleges this plethora of essential governmental services and benefits.

threat to the diversity and other benefits these institutions offer.

3. Other courts—including several federal circuits—have likewise read *Locke* as validating a general hostility to religion as a legitimate "anti-establishment interest." Courts have thus found that governments have a legitimate interest in forbidding the following types of benefits to religious schools:

- state scholarship funds used for both religious and secular primary and secondary schools, see *Eulitt ex rel. Eulitt* v. *Maine Dept. of Educ.*, 386 F. 3d 344, 349 (1st Cir. 2004);
- the use of school buildings for religious services after hours, even when secular groups are allowed to make analogous use of the buildings, see *Bronx Household of Faith* v. *Bd. of Educ.*,750 F.3d 184, 187-188 (2d Cir. 2014), *cert. denied,* __ U.S. __ (2015);
- publicly funded placements of at-risk youth in social service programs that include religion, see *Teen Ranch Inc.* v. *Udow*, 479 F.3d 403, 409-412 (6th Cir. 2007); and
- acceptance of religion classes at religious schools in satisfaction of course requirements for college admission, see *Ass'n of Christian Schs. Int'l* v. *Stearns*, 362 F. App'x 640, 645-646 (9th Cir. 2010).

Such decisions are of great concern to religious colleges and universities, for they imply that governments have a legitimate, general "anti-establishment interest" in treating religious institutions *worse* than similarly situated secular institutions. Rather than embracing pluralism, this approach reflects a return to

the forced orthodoxy and sectarian bias of the Blaine Amendment era.

4. A related area of concern is equal access to tax exemptions and other financial benefits. The Solicitor General put this issue on the table in this Court just last year when asked at oral argument whether a religious school's tax exemption could be revoked based on its beliefs and practices about marriage. His forbidding response was that "it is going to be an issue."[28] And it certainly will be "an issue" if *Locke* provides as broad a mandate for religious discrimination as the lower courts in this case believed.

Some have even advocated denying religious colleges other forms of taxpayer assistance, such as government contracts, Pell grants, and student loans.[29] For example, a California State Assembly bill introduced earlier this year would prohibit students from using "Cal Grants"—funds provided to low income students who might not otherwise be able to afford a higher education—at any institution that has applied for a waiver by the U.S. Department of Education from Title IX's nondiscrimination requirements.[30] Although the religious exemption from Title IX has been

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[28] Transcript of Oral Argument on Question 1 at 36-38, *Obergefell* v. *Hodges*, 135 S.Ct. 2584 (No. 14-566) (2015); *see also Obergefell*, 135 S. Ct at 2626 (Roberts, C.J., dissenting).

[29] See Letter from Stanley Carlson-Thiess, et al. to President Obama, Sep. 10, 2015, available at: http://www.irfalliance.org/wp-content/uploads/2015/09/Letter-to-President-to-maintain -OLC-memo-9-10-2015.pdf; Susan M. Shaw, *Federal Funding Is Not a Form of Religious Liberty* Huffington Post (Dec. 17, 2015, 2:40PM), available at: http://www.huffingtonpost.com/susan-m-shaw/federal-funding-is-not-religious-liberty_b_8813740.html.

[30] Assemb. B. 1888, 2015-2016 Leg. (Cal. 2016).

available for decades, and is deemed essential to many schools' ability to operate in accordance with their religion, religious colleges in California may soon lose state financial benefits—available to non-religious institutions—simply for invoking that established federal right.

Whether tax-exempt status and other generally available benefits will be available for religious colleges largely depends on how this Court interprets *Locke*. For reasons detailed below, this Court should explain that *Locke* in no way sanctions the kind of blatant religious discrimination represented by these calls to end various benefits to religious institutions.

5. Accreditation is another area of concern. True, as noted previously, an important provision of the 2008 Higher Education Opportunity Act requires accreditation bodies to "respect" religious colleges' "religious missions."[31] Nevertheless, calls for accreditation bodies to ignore religious missions and impose contrary secular norms continue.[32] And a broad interpretation of *Locke* would embolden those who seek to deprive religious colleges of accreditation based on the good-faith pursuit of their religious missions.[33]

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[31] Higher Education Opportunity Act, Public Law 110-315 (2008), *codified at* 20 U.S.C. § 1099b(c), (a)(4)(A).

[32] Some have even suggested that schools obtaining routine waivers from the Department of Education should be subject to accreditation complaints. See, e.g., Andy Birkley, *Dozens of Christian schools win Title IX waivers*, The Column (Dec. 1, 2015), available at: http://thecolu.mn/21270/dozens-christian-schools-win-title-ix-waivers-ban-lgbt-students.

[33] See, *e.g.*, *id.*; Peter Conn, *The Great Accreditation Farce*, The Chronicle of Higher Education (June 30, 2014), http://chronicle.com/article/The-Great-Accreditation-Farce/147425/; Parker

One recent example is the debate involving the president of Gordon College, who signed a letter advocating for "banning discrimination" through an executive order while at the same time allowing exemptions from that order—so that "an extension of protection for one group not come at the expense of faith communities."[34] The response to this thoughtful letter was swift: At least one local government canceled an important contract with the college,[35] the media criticized it for its stance on historical Christian principles of sexual morality, and its regional accreditation was called into question.[36] While the college was eventually able to maintain its accreditation, the episode was a stark reminder that a broad reading of *Locke* would make it easier for the enemies of religious colleges—in

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Wishik, *Gay Student Expelled from U. the Cumberlands; School May Lose Funding*, N.Y. Times (May 4, 2006), available at: http://www.nytimes.com/uwire/uwire_HYNC050420062147263.html; Elizabeth Reiner Platt, *Bad Apples: The "Right to Discriminate" in Schools*, Public Rights, Private Conscience Project (Dec. 16, 2015) available at: http://blogs.law.columbia.edu/publicrightsprivateconscience/2015/12/16/bad-apples-the-right-to-discriminate-in-schools.

[34] Letter from Joel C. Hunter, et al. to President Obama, July 1, 2014, available at: http://bit.ly/ExemptionLetter.

[35] The local school district voted to end a long-standing partnership with the college under which its education students did their student teaching in the district. Oliver Ortega, *Lynn public schools sever relationship with Gordon College*, Boston Globe (Aug. 30, 2014) available at: https://www.bostonglobe.com/metro/2014/08/29/lynn-public-schools-sever-relationship-with-gordon-college/aw1KwO4RGVpn284rR1jTgO/story.html.

[36] Matt Rocheleau, *Accrediting agency to review Gordon College*, Boston Globe (July 11, 2014), available at: http://bit.ly/AgencytoReview.

a variety of circumstances—to attack their accreditation.

If *Locke* were interpreted to allow governments or quasi-government agencies like accrediting bodies to discriminate against religious colleges, the consequences would be sweeping. Under this reading of *Locke*, students (and their parents) would find less diversity in the marketplace of higher education. And the upshot would likely be increased social strife over religion and religion-related issues, as ever-more intrusive governments seek to penalize religious colleges for not pursuing whatever objectives the government deems most important at the time. Such "divisiveness based upon religion [would] promote[] social conflict, sapping the strength of government and religion alike." *Van Orden* v. *Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring).

II. This Court Should Adopt A Neutrality Principle Under Which Religious Discrimination In The Allocation Of Government Benefits Is Constitutionally Permissible Only In The Kinds Of Narrow Circumstances Presented In *Locke*

Principles already established in this Court's precedent mark a roadmap for avoiding the problems outlined above. As this case is far outside the realm of *Locke*, the relevant case law dictates that the proper rule in this case and others like it a rule of genuine neutrality between secular and religious organizations.

A. Whether or not *Locke* was correct, its holding was expressly limited to the denial of government funding for training clergy, and its reasoning supports a general principle of neutrality in access to government benefits.

Some of the *amici* here have previously expressed skepticism about the rule adopted in *Locke*.[37] But whether or not *Locke* was correctly decided, its approval of religious discrimination was expressly limited to the specific type of discrimination there. And in other respects, *Locke supports* a general rule of neutrality as between secular and religious institutions.

1. The issue in *Locke* was whether a state that offered scholarships for students seeking almost all college degrees could deny such scholarships to students seeking a degree in devotional theology, *i.e.*, training for the ministry. 540 U.S. at 715. In ruling that Washington could forbid that specific use of its scholarships, the Court found that the funding of devotional degrees

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[37] See Brief of Amici Curiae Religious Colleges and Universities, *Locke* v. *Davey*, 540 U.S. 712 (2004).

is a form of funding for training ministers, the avoidance of which the Court deemed a legitimate "anti-establishment interest." *Id.* at 722.

In support, the Court cited early state constitutions demonstrating the widespread nature of this concern at the Nation's founding. 540 U.S. at 723. Because prohibiting the funding of ministers is a classic anti-establishment interest, the Court held, "[t]he State's interest in not funding the pursuit of devotional degrees is substantial." *Id.* at 725. That specific interest, the Court held, justified the religious discrimination challenged in that case—that is, denying funds for ministerial training. And the Court explicitly limited its holding to those facts, declining to "venture further into this difficult area." *Ibid.*.

2. Still, three aspects of *Locke's* subsidiary reasoning support a general rule of neutrality as between non-religious and religious institutions.

First, as noted, the Court held that only a very narrow interest—avoiding the funding of ministerial training—could justify the religious discrimination in Washington's scholarship program. The court did not rely upon a general interest in avoiding the "promotion" or "endorsement" of religion, or even a general principle of avoiding any form of direct or indirect financial assistance to religion. Thus, the holding and rationale of *Locke* are entirely compatible with a general rule of neutrality in governmental benefits.

Second, in its historical analysis the Court made clear that the only cognizable "anti-establishment interests" are those that are grounded in the history of the founding period. Unlike funding for ministers, there is no evidence that funding of religious activity in general was viewed as an improper establishment

of religion, much less funding of religious schools. To the contrary, there is ample evidence that religious schools and other educational efforts *did* receive substantial public funding and other assistance during the early part of our Nation's history.[38]

This aspect of *Locke* makes clear the error of lower court decisions—such as *University of the Cumberlands, Bronx Household of Faith, Teen Ranch* and *Association of Christian Schools International*—that rely upon "anti-establishment interests" that are not grounded in the history of the founding period. Indeed, *Locke* refutes the idea that there exists some general interest in avoiding *any* assistance to religion—in the form of tax-exempt financing, see *University of the Cumberlands, supra,* in the use of publicly owned facilities, see *Bronx Household of Faith, supra,* in contracts with social service agencies that include a religious component in their services, see *Teen Ranch, supra,* or in allowing religion courses taught by religious institutions to satisfy college admissions requirements, see *Ass'n of Christian Schools, supra.* Under the reasoning of *Locke,* none of these interests is a cognizable "anti-establishment interest," because none of

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[38] See, *e.g.*, Jonathan Wright, *Shapers of the Great Debate on the Freedom of Religion: A Biographical Dictionary* 195 (2002) (describing government funding of religious schools under the 1819 Civilization Fund Act, 3 Stat. 516-17 (1819)); *Quick Bear* v. *Leupp*, 210 U.S. 50, 78 (1908) (noting that "the Government for a number of years [has] made contracts for sectarian schools for the education of the Indians," and rejecting First Amendment challenge to that practice). See also Northwest Ordinance (1787) ("Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.").

them has a legitimate grounding in the history of the founding period.

Third, Locke noted *with approval* that the Washington program funded many programs run by religious schools—such as religion classes taken while pursuing a *non*-ministerial degree. *Id.* at 724-25. Indeed, the Washington scholarship program openly allowed "students to attend pervasively religious schools" on state-funded scholarships, as long as they weren't seeking ministerial degrees. *Id.* at 724. Thus, the Court concluded that, in the administration of the Washington program, there was no evidence of a *general* hostility to religion. *Id.*

By negative inference, that reasoning casts further doubt on decisions like *University of the Cumberlands* and others that have treated *Locke* as legitimizing general anti-religious bias in public benefits. Indeed, that reasoning strongly suggests that such evidence would have made the Washington program invalid—either under the Free Exercise Clause, the Equal Protection Clause, or both. See *id.* at 718 (discussing plaintiffs' constitutional theories). As explained below, except where a specific, history-based anti-establishment interest is at stake, those clauses require that government be neutral as between religious and non-religious institutions.

B. Except where religious discrimination is protected by a clear tradition going back to the founding period, the First and Fourteenth Amendments require genuine religious neutrality in the allocation of governmental benefits.

Because *Locke* cannot justify the religious discrimination at issue here, general principles of neutrality control this and analogous cases. That is true whether the government excludes all religious groups from a state benefit, or only certain religious groups.

1. In a string of decisions culminating in *Good News Club* v. *Milford Central School*, this Court has consistently held that there is "no valid Establishment Clause interest" in denying religious groups access to limited public forums. 533 U.S. 98, 113 (2001). And the same principle applies to otherwise generally available funding. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 838-46 (1995). Indeed, allowing religious groups equal access to such funding on neutral terms is "a significant factor in *upholding* governmental programs in the face of Establishment Clause attack[.]" *Good News Club*, 533 U.S. at 114 (quoting *Rosenberger*, 515 U.S. at 839 (1995)) (emphasis added).

Echoes of this neutrality principle are found in more recent Establishment Clause opinions. For example, the four dissenting Justices in *Town of Greece* v. *Galloway* noted that "our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian." 134 S.Ct 1811, 1841-42 (2014). And so too here: "Our public institutions"—including all the governmental bodies that allocate benefits or contracts—"belong no less" to the religious than to the

non-religious. And accordingly, there should be no discrimination between religious and secular institutions in the allocation of such benefits.

2. Settled free speech and free exercise doctrine also requires that both speech and actions undertaken for religious reasons not be treated adversely merely because of their religiosity. See *Good News Club*, 533 U.S. at 114. As this Court has put it, "[t]he government may not . . . impose special disabilities on the basis of religious views or religious status." *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U.S. 872, 877 (1990). Rather, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral [] and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993) (citing *Smith*, 494 U.S. at 877 (1990)).

This is no less true when religious individuals seek to use religion in pursuing ends that others may pursue through secular means. For example, in *Good News Club*—and without disagreement from the dissent—the Court explained that, if a school district's policy allowed a group to meet with a goal of improving "the welfare of the community" by reading Aesop's Fables, the district must allow other groups to pursue the same goal through religious means. 533 U.S. at 108-110. Likewise, in *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, the Court concluded that, because the school district's policy generally allowed the kind of presentation requested there—a presentation about family values—the school district could not refuse to allow the presentation solely because of its religiosity. 508 U.S. 384, 393-394 (1993).

3. The same principle obviously applies to religious higher education. Consider for example a rule making the tax-exempt status of religious colleges and universities contingent on their hiring professors irrespective of religious belief. Such a rule would not be neutral between religious and secular private colleges: Secular colleges could still use *their* chosen criteria—which would be secular in nature—in making employment decisions, while religious colleges would be unable to use the criteria of greatest importance to their chosen missions. Such a rule would thus penalize colleges for making religiously driven choices—just as anti-Catholic bias fueled earlier, misguided applications of the Blaine Amendments.

This too would violate the First Amendment. As the Court noted in *Hosanna-Tabor*, conditioning governmental benefits on such hiring practices would "interfere[] with the internal governance" of religious schools, "depriving the [school] of control over the selection of those who will personify its beliefs." *Hosanna-Tabor* v. *EEOC*, 132 S.Ct 694, 706 (2012). Further, as Justices Alito and Kagan noted in *Hosanna-Tabor*, "[f]orcing a group to accept certain members may impair [its ability] to express those views, and only those views, that it intends to express." *Id.* at 712 (quoting *Boy Scouts of America* v. *Dale*, 530 U.S. 640, 648 (2000)). Justices Alito and Kagan noted that these principles apply "with special force [] to religious groups"—which plainly includes religious colleges and universities. See *id.*

These concerns are implicated, moreover, whether a government *mandates* that all colleges comply with a chosen norm—in our example, religious neutrality in hiring—or instead uses monetary *incentives* that make it difficult for the school to operate if it refuses

on religious grounds to accept that norm. A broad interpretation of *Locke* would interfere with these rights by making the institutional autonomy of religious organizations subservient to the secular norms of the day.

The Court, moreover, said nothing to the contrary in *Christian Legal Society* v. *Martinez*, in which a public law school was allowed to require a Christian group, as a condition of public benefits, to abandon religious criteria for its leaders. 130 U.S. 2971 (2010). The majority in *Christian Legal Society* addressed the school policy on the assumption that it was applied equally to *all* school groups. *Id.* at 2982-2984. Different considerations would have applied had the decision hinged on whether the group was singled out because of its religious character. See *Good News Club*, 533 U.S. at 114; *Rosenberger.*, 515 U.S. at 828; *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993) (strict scrutiny for non-neutral treatment of religion).

4. This case is a textbook example of neutrality's importance. Petitioner seeks funding through a grant program akin to the programs at issue in *Rosenberger*, *Good News Club*, and *Lamb's Chapel*. In this case, as in those cases, petitioner seeks to achieve the same end as its secular counterparts: providing a safer playground for children.

Of course, neutrality does not require the state to allow religious benefactors to use state resources for *unapproved* secular purposes—say, a church attempting to use the tire funding here to retrofit cars. But neutrality requires that both secular and religious applicants be able to use the benefit to achieve the same goal—here, resurfacing a playground. And it does not

matter whether religion will be spoken of on the playground any more than it mattered to the on-campus club in *Rosenberger* or the after-school programs in *Good News Club* and *Lamb's Chapel*.

In short, by refusing to allow petitioner to participate in the program at issue here on the same terms as secular organizations, the government discriminates on the basis of religion just as surely as the governments did in those cases. And because there is no cognizable "anti-establishment interest" here—that is, no anti-establishment interest with a pedigree going back to the founding period, as in *Locke*—that discrimination violates the First and Fourteenth Amendments.

C. At a minimum, unless the benefit would directly fund essentially religious activity, the Constitution requires that people and institutions of faith be treated no worse than other people and institutions.

But even if the Court were unwilling to cabin *Locke* in that manner, the Court should still hold that, except for the rare situation presented there, religious neutrality is required unless the government benefit would directly fund essentially religious activity.

Obviously, the causal chain between government benefits and religion can be long or short. For example, no court or commentator of which *amici* are aware disputes that individuals may use tax refunds, Earned Income Tax Credits, or income from a government job to benefit churches. At the other end of the spectrum, no one would suggest that the Constitution permits the federal government to pay directly for printing of churches' proselytizing materials.

From an Establishment Clause perspective, moreover, "direct benefits"—money given directly to a church because of its religiosity—are obviously of greater concern than "incidental benefits"—money that eventually wends its way into the institution's coffers, or is given to the institution for secular reasons. See *Board of Ed.* v. *Mergens*, 496 U.S. 226, 260-61 (1990) (Kennedy, J., concurring in part and in the judgment). But, as even the dissent in *Rosenberger* recognized, *indirect* aid, given evenhandedly to both religious and non-religious individuals, is "simply not within the contemplation of the Establishment Clause's broad prohibition." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 881 (1995) (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ, dissenting). That is, indirect assistance does not raise any cognizable anti-establishment interest.

Accordingly, aside from the rare situation in *Locke*, a government benefit that does not directly advance an institution's essentially *religious* mission raises no conceivable Establishment Clause concerns—and thus cannot possibly justify religious discrimination in the allocation of governmental benefits or contracts. For example, a student's use of a taxpayer-funded Pell Grant or scholarship to pursue a mathematics degree at a religious university raises no Establishment Clause concerns whatsoever: Any encounters with religion at the university are not part of the *government's* purpose in awarding the grant or scholarship, which therefore cannot be considered "direct aid" to

the university's essentially religious mission.[39] Accordingly, in such circumstances, to discriminate against a religious organization in access to such a benefit is a clear violation of the First and Fourteenth Amendments. See *Rosenberger*, 515 U.S. at 881 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ, dissenting).[40]

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[39] To be sure, the *college* in that circumstance may well consider training mathematicians as part of its religious mission. But unlike preparing students to conduct religious services, training students to be mathematicians is not *essentially* religious—that is, it has substantial secular significance regardless of its religious significance, and thus would not trigger Establishment Clause scrutiny. See *Locke*, 540 U.S. at 724-25 (noting variety of religious activities the scholarships at issue there could be used for); *Rosenberger*, 515 U.S. at 839 ("We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.").

[40] Indeed, even if the student were using the Pell Grant or scholarship to train for the ministry, there would still be no plausible Establishment Clause violation. That is because a grant or scholarship given to a student would properly be viewed as directly assisting the *student*, not the institution the student attends. See Federal Student Aid, Federal Pell Grants, available at: https://studentaid.ed.gov/sa/types/grants-scholarships/pell (noting funds may be paid directly to the student); *Locke*, 540 U.S. at 724-25 (noting students in the Washington program may attend theology courses) That is no doubt why the majority in *Locke* carefully avoided any suggestion that awarding the scholarship in that case to a student studying for the ministry would actually *violate* the Establishment Clause. To the contrary, the Court noted that with respect to state aid, "the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution." 540 U.S. at 722. There is no federal provision that would require, much less justify, limiting Pell Grants or federal student loans in the manner at issue in *Locke*.

This is precisely such a case of indirect, incidental aid. As petitioner explains more fully, it seeks the funding at issue here for the same purposes as any secular preschool. Pet. Br. 4. And whether or not it receives the funding, its religious and other teachings will go on in exactly the same way. Excluding petitioner from that funding thus violates both the Free Exercise Clause and the Equal Protection Clause, even under the broadest plausible reading of the Establishment Clause.

CONCLUSION

Petitioner and Judge Gruender are correct: Missouri's denial of funding for playground resurfacing merely because petitioner is religious is unconstitutional. In ruling for petitioner, this Court should reaffirm the principles of neutrality mandated by the First and Fourteenth Amendments. This will protect religious colleges and universities from the kind of governmental religious discrimination that would threaten those institutions' viability and, hence, the many benefits they bring to American higher education.

For all these reasons, and those explained by petitioner, the decision below should be reversed.

Respectfully submitted,

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RECORD AND BRIEFS

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In the
Supreme Court of the United States

TRINITY LUTHERAN CHURCH
OF COLUMBIA INC.,
Petitioner,

v.

SARA PARKER PAULEY, Director,
Missouri Department of Natural Resources,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR *AMICI CURIAE* DOUGLAS COUNTY SCHOOL DISTRICT AND DOUGLAS COUNTY SCHOOL BOARD IN SUPPORT OF PETITIONER

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INTRODUCTION AND STATEMENT OF INTEREST[1]

The Douglas County School Board ("Board") is charged by Article IX, §15 of the Colorado Constitution with "guid[ing] and manag[ing] both the action and practice of instruction as well as the quality and state of instruction" in the Douglas County School District ("District," or, together with the Board, "Douglas County"). *Bd. of Educ. of Sch. Dist. No. 1 in City & Cty. of Denver v. Booth*, 984 P.2d 639, 648 (Colo. 1999). In fulfillment of that charge, Douglas County established a comprehensive set of reforms designed to improve educational opportunity for Douglas County students that included a scholarship program to provide tuition assistance for qualified students to attend area private schools. The scholarships were both generally available and religiously neutral: Any Douglas County student meeting a one-year residency requirement could apply, and any qualifying student was free to use the scholarship money to attend a participating private school of his or her choice. No money went to any private school except by virtue of the independent decisions of students and parents.

Nevertheless, because some of the participating private schools are religiously affiliated, the Supreme

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[1] Pursuant to this Court's Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to this Court's Rule 37.3, *amici* have obtained consent from respondent; petitioner has consented to the filing of all *amicus* briefs in a letter on file with the Clerk's office.

Court of Colorado enjoined the program on the ground that it violated Article IX, §7 of the Colorado Constitution—the Colorado Blaine Amendment. That provision has been in the Colorado Constitution since statehood and, true to its anti-Catholic roots, broadly prohibits the State from "mak[ing] any appropriation, or pay[ing] from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose."

Douglas County filed a petition for a writ of certiorari on October 28, 2015, arguing that the Colorado Supreme Court's decision violated the Religion Clauses of the First Amendment and the Fourteenth Amendment. That petition is apparently being held for this case. Thus, although the *Douglas County* case, which involves an indirect aid program, is even more problematic, the Court's resolution of this case will materially affect Douglas County. Indeed, if the Court reverses the Eighth Circuit's decision here, the Court should grant, vacate and remand *Douglas County* so that the federal guarantee of religious neutrality can be restored in Colorado.

SUMMARY OF THE ARGUMENT

The Eighth Circuit construed this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), to allow states with broadly worded Blaine Amendments to discriminate against religion in the administration of otherwise neutral and generally available government aid. In addition to improperly excluding religious persons and institutions from participating in government aid programs, the Eighth Circuit's decision puts local governments in an intolerable bind. Pursuant to state law, a local government must either

deviate from the federal guarantee of neutrality and discriminate against religious persons and institutions in conferring benefits, or defeat sound governmental objectives by withholding all aid to avoid the compelled discrimination. This is precisely the Hobson's choice created by the Colorado Supreme Court's decision in *Douglas County*, which held that Douglas County's neutral scholarship program violated the Colorado Blaine Amendment because some religiously affiliated schools would indirectly receive funding as a result of the intervening decisions of parents and students. The federal Constitution allows states and localities to accomplish legitimate objectives while steering a course of neutrality. It does not require governments to choose between discriminating or withholding benefits.

The Eighth Circuit's decision was flatly wrong. *Locke* authorized a limited departure from the rule of neutrality only in the very specific context of funding for the vocational theological training of clergy, and solely because of the unique Establishment Clause concerns such funding creates. Those concerns simply are not present in the context of funding to improve the safety of children's playgrounds.

The Colorado Supreme Court's application of *Locke* was even more erroneous. The scholarship program at issue in *Douglas County* involved only *indirect* aid in a context that this Court has already considered and held to be neutral and permissible. As in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), no money finds its way to any private school under the scholarship program except as a result of the intervening and truly independent decisions of

parents and students. This Court has already made clear that such a program raises no Establishment Clause concerns. The threat to neutrality instead comes from misguided decisions that would force a school district to sacrifice educational objectives and narrow educational opportunity by excluding religious schools.

Finally, both the Colorado and Missouri Blaine Amendments share discriminatory, anti-Catholic origins that make their contemporary use to compel religious discrimination particularly unacceptable. This Court has held that laws based on animus against a particular group are unconstitutional, and it has repeatedly recognized the anti-Catholicism that gave rise to the provisions at issue in this case and in *Douglas County*. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion); *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting). The anti-Catholic virulence that gave rise to the Colorado Blaine Amendment is particularly acute, and that provision has been neither amended, reenacted, nor reauthorized since its bigoted birth in 1876. Thus, whether in this case, or by eventually granting plenary review in *Douglas County*, this Court should ensure that provisions initially designed to discriminate against a single religion are not used to discriminate against all religions and interfere with the principles of neutrality that inform the federal Religion Clauses.

ARGUMENT

I. The Eighth Circuit's Reading Of *Locke* Forces Governments Either To Discriminate Based On Religion Or To Withhold Generally Available Benefits.

A. The Religion Clauses Demand Government Neutrality Between Religion and Nonreligion.

The basic command of the Religion Clauses of the First Amendment is neutrality. *See, e.g., Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). States may neither confer benefits on individuals or institutions because of their religious identity nor single them out for disfavored treatment. *See, e.g., Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947) ("State power is no more to be used so as to handicap religions, than it is to favor them."). Neutrality extends not just to affirmative regulatory legislation, but also to government benefits decisions. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) ("For the 'guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.'" (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995)).

In *Locke*, this Court held that states could decline to fund vocational theological degrees for clergy. If *Locke* is a departure from the principle of neutrality, it is an extremely limited one. As explained in greater detail *infra*, *Locke* authorized discrimination only because of the unique history of, and concerns with,

government funding of devotional theological study by clergy and because the burden on the affected individuals was insubstantial. *Locke*, 540 U.S. at 722 n.5, 724-25.

Many lower courts, however, have read *Locke* as authorizing a far more substantial deviation from the basic guarantee of government neutrality toward religion. The Eighth Circuit's decision below is a prime example. The Eighth Circuit read *Locke* to authorize wholesale discrimination against religion in the administration of otherwise neutral and generally available aid programs. *See* Pet.App.10a-12a & n.3.

Reading *Locke* as broadly as the Eighth Circuit and Colorado Supreme Court read it places state and local governments in a serious bind. In states with constitutional provisions interpreted to forbid the extension of otherwise neutral and generally available aid to religious people or institutions, state and local governments cannot fund any public-private collaboration in the delivery of services without openly discriminating based on religion. Thus, a state that wishes to provide safer playground facilities for children is required to discriminate against religiously affiliated facilities and those who attend them, or not fund safe playgrounds at all. And, as the *Douglas County* case unfortunately demonstrates, a local government must exclude institutions from an otherwise neutral and generally applicable scholarship program, simply because they are deemed to have a religious affiliation. The notion that the Constitution is indifferent to this rank religion-based discrimination is untenable.

B. *Douglas County* Demonstrates the Difficult Position in Which Departures from Neutrality Have Placed State and Local Governments.

1. The Choice Scholarship Program

The *Douglas County* case highlights the quandary created by an overbroad reading of *Locke*. The facts of that case illuminate the issues in this case and the implications of what is at stake.

In June 2010, the District charged a task force with developing proposals to "improve choice for parents and students in the district." *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist. RE-1*, No. 11cv4427, at 2 (Colo. Dist. Ct. Aug. 12, 2011) ("Dist.Ct.Op."). After considering a wide range of options, the Board ultimately adopted a comprehensive program of educational reforms that included the Choice Pilot Scholarship Program ("Scholarship Program"). Dist.Ct.Op.4.

Modeled on the program approved by this Court in *Zelman*, the Scholarship Program was designed to "provide greater educational choice for students and parents to meet individualized needs, improve educational performance through competition, and obtain a high return on investment of [Douglas County School District] educational spending." Dist.Ct.Op.3. It provided monetary scholarships to the parents of qualifying students, who then used the funds to offset tuition at private schools that participated in the Scholarship Program. *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 464-65 (Colo. 2015). Students were eligible to participate if they resided in the District for at least a year and had been

enrolled in a District public school the previous year. *See* Dist.Ct.Op.4. A student who satisfied these criteria had to apply and be admitted into the Scholarship Program by the District, and also had to separately apply and obtain admission to the participating private school where the student wished to enroll. Dist.Ct.Op.4-5; *see also Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 356 P.3d 833, 838 (Colo. App. 2013).

For each student admitted into both the Scholarship Program and a participating private school, the District issued a restricted check payable to the parents of the student. Dist.Ct.Op.3. The parents then endorsed the check to the participating private school in which their children were matriculating. *Douglas Cty.*, 356 P.3d at 839; Dist.Ct.Op.3. For the 2011-2012 school year, the Program provided families a scholarship of up to $4,575. *Douglas Cty.*, 351 P.3d at 465; Dist.Ct.Op.3.

Thirty-four private schools applied to participate in the Scholarship Program in its first year. The District accepted twenty-three applicants. *Douglas Cty.*, 356 P.3d at 838; Dist.Ct.Op.6. Of those twenty-three schools, sixteen have some affiliation with a religious organization; seven do not. *Douglas Cty.*, 356 P.3d at 838; Dist.Ct.Op.9 The Scholarship Program's materials expressly instruct families to investigate a participating private school's "admission criteria, dress codes and expectations of participation in school programs, be they religious or nonreligious" before applying or enrolling. Dist.Ct.Op.4.

No student is required to apply to or attend any particular private school, or even to apply to the

Scholarship Program; participation is wholly voluntary. Students who elect not to participate receive a free education at a District public school. *See Douglas Cty.*, 356 P.3d at 844.

2. Litigation in the Colorado State Courts.

As Douglas County began implementing the Scholarship Program, a group of parents and taxpayers sued Douglas County, the Colorado Board of Education, and the Colorado Department of Education. *Douglas Cty.*, 351 P.3d at 466 & n.7. They alleged, *inter alia*, that the Scholarship Program violated Colorado's Public School Finance Act of 1994, Colo. Rev. Stat. §22-54-101, and the Colorado Blaine Amendment.

Respondents moved for a preliminary injunction, and the district court held a three-day evidentiary hearing. Dist.Ct.Op.1. Along with other evidence, Douglas County introduced unrebutted expert testimony regarding the anti-Catholic origins of the failed federal Blaine Amendment and of its Colorado counterpart. *Douglas Cty.*, 351 P.3d at 485 (Eid, J., concurring in part and dissenting in part). Douglas County also expressly argued that using the Colorado Constitution to require it to discriminate on the basis of religion would violate the federal Constitution. Dist.Ct.Op.32-35.

Although the district court found the Scholarship Program to be "a well-intentioned effort ... to aid students and parents, not sectarian institutions," Dist.Ct.Op.39, 44, it nevertheless held that the Scholarship Program violated the Public School Finance Act and the Colorado Blaine Amendment. In

determining that the Program violated the Colorado Blaine Amendment, the district court concluded that some of the participating private schools were "sectarian or religious." Dist.Ct.Op.36. It did so by exhaustively combing through their curricula, scrutinizing the composition of their governing bodies and funding sources, and scouring the schools' admission criteria for signs that they "tend to indoctrinate and proselytize" according to "religious beliefs or practices." Dist.Ct.Op.9-12. The court then concluded that "any funding of the private schools, even for the sole purpose of providing education, would further the sectarian purpose of religious indoctrination within the schools [sic] educational teachings" and therefore violate the Colorado Blaine Amendment. Dist.Ct.Op.40. The district court also held that applying §7 to require Douglas County to discriminate against religion would not violate the federal Constitution. Dist.Ct.Op.32-35.

The Colorado Court of Appeals reversed. It held that respondents lacked standing to bring their Public School Finance Act challenge. *Douglas Cty.*, 356 P.3d at 840. On the merits, it concluded that the Scholarship Program does not violate the Colorado Blaine Amendment.

The court criticized the district court's searching inquisition of the beliefs and practices of the participating private schools, including "the degree to which those schools 'infuse religious teachings into the curriculum.'" *Id.* at 848 (quoting Dist.Ct.Op.45). It observed that this Court has rejected such doctrinal inquiries as an impermissible means to answer a constitutional question and an unconstitutional end in

themselves. *Id.* at 849. The court further noted that the Scholarship Program was "facially neutral toward private religious schools because it is open to all private schools." *Id.* at 850. It concluded that because the Scholarship Program "is neutral toward religion generally and toward religion-affiliated schools specifically," construing the Colorado Blaine Amendment to require exclusion of religiously affiliated schools from such "otherwise neutral and generally available government support" was "forbidden by the First Amendment." *Id.*

A deeply divided Supreme Court of Colorado granted review and reversed. Six of the Court's seven Justices held that respondents lacked standing to bring their Public School Finance Act challenge. *Douglas Cty.*, 351 P.3d at 466-69; *id.* at 480 n.1 (Eid, J., concurring in part and dissenting in part). Three of those Justices further held that the Scholarship Program violates the Colorado Blaine Amendment, and that the Amendment, as so employed, does not violate the federal Constitution. *Id.* at 469-75. The other three Justices disagreed, concluding that the Scholarship Program does not violate the Colorado Blaine Amendment and that holding otherwise raises grave concerns under the federal Constitution. *Id.* at 479-86 (Eid, J., concurring in part and dissenting in part). The seventh Justice found that the plaintiffs had standing to challenge the program under the Public School Finance Act and concluded that the Scholarship Program violated that act. *Id.* at 475-79 (Marquez, J., concurring in the judgment). With four Justices joining the judgment—a dispositive plurality doing so on Blaine Amendment grounds—the court enjoined the Scholarship Program.

3. Douglas County's Petition for a Writ of Certiorari

On October 28, 2015, Douglas County petitioned this Court for a writ of certiorari. *See* Pet., *Douglas Cty. Sch. Dist. v. Taxpayers for Public Educ.* (No. 15-557).[2] Douglas County argued that the Colorado Blaine Amendment was a virulently anti-Catholic state constitutional amendment designed to choke off public funding for Catholic, or "sectarian" schools, in the 1870s. It explained at length how anti-Catholic sentiment after the Civil War nearly led to the enactment of an amendment to the U.S. Constitution forbidding public funding of "sectarian" schools. Pet.5-8 (No. 15-557). When that amendment narrowly failed, dozens of states enacted their own versions. *Id.* at 8. Douglas County, relying on historical sources and on unrebutted testimony presented during the preliminary injunction hearing, explained how the Colorado Blaine Amendment—unamended and never reauthorized since its passage—is the quintessential example of a state Blaine Amendment. *Id.* at 8-11. Douglas County argued that this Court has long held that facially neutral laws that are products of animus are unconstitutional, and that fact alone required reversal of the Colorado Supreme Court's judgment.

Douglas County further argued that the Colorado Supreme Court's decision deepened an existing split on the scope of this Court's decision in *Locke*, 540 U.S. 712. While the Tenth and Seventh Circuits have interpreted *Locke* not to authorize wholesale

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[2] The State of Colorado and a group of parents who intervened as defendants below also separately petitioned for writs of certiorari. *See* Nos. 15-556, 15-558.

discrimination against religious organizations in the administration of otherwise neutral and generally available aid, the Colorado Supreme Court joined the First Circuit and the Eighth Circuit (in this case) in holding that it did. *See* Pet.25-34 (No. 15-557). Douglas County argued that *Locke* itself, as well as other Free Exercise Clause precedents and other constitutional decisions, made clear that *Locke* permitted the state to withhold otherwise neutral and generally available aid only from the vocational theological instruction of clergy. Reading *Locke* to authorize anything more would essentially unravel this Court's longstanding commitment to neutrality and undermine antidiscrimination principles enshrined in the First and Fourteenth Amendments.

At bottom, the petition argued, decisions like those by the Colorado Supreme Court and the Eighth Circuit impermissibly force governments like Douglas County to take one of two untenable approaches: Discriminate against religion in the administration of generally available aid, or decline to extend such aid to anyone. The Constitution does not put governments to this intolerable choice.

II. The Eighth Circuit's Decision In *Trinity Lutheran* Is Wrong, And Its Extension To Indirect Aid Programs Approved By This Court Is Even More Wrong.

A. The Eighth Circuit's Decision Is Deeply Flawed and Should Be Reversed.

The Eighth Circuit held that using the Missouri Blaine Amendment to deny a religiously affiliated daycare's application for a safer playground surface passed federal constitutional muster by relying on this

Court's summary affirmance in *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974), and its decision in *Locke*. In doing so, the Eighth Circuit committed plain error. *Luetkemeyer* is wholly inapposite, and the Eighth Circuit fundamentally misunderstood *Locke*.

In *Luetkemeyer*, Missouri officials interpreted the state's busing statutes and its Blaine Amendment to "prohibit[] the transportation at public expense of children to and from a non-public school." *Luetkemeyer*, 364 F. Supp. at 379. The parents of children attending a Roman Catholic private school contended that the Constitution required Missouri to provide the same sort of busing system for private-school students as it did for public-school students. *Id.* at 377. The three-judge district court rejected the challenge, holding that the state was under no obligation to fund *private* schools—both religious and nonreligious, *see id.* at 387—simply because it funded *public* schools, *see id.* at 382 (quoting *Norwood v. Harrison*, 413 U.S. 455, 462 (1973)). This Court affirmed without opinion. *Luetkemeyer v. Kaufmann*, 419 U.S. 888 (1974). Justice White, joined by Chief Justice Burger, dissented, arguing that because the case presented an important Free Exercise Clause question, the Court should have noted probable jurisdiction and heard argument. *Id.* at 890 (White, J., dissenting).

In this case, the Eighth Circuit majority concluded that because *Luetkemeyer* had rejected at least one Free Exercise Clause challenge, the Missouri Blaine Amendment could not possibly be *facially* unconstitutional. Pet.App.8a-9a. There are, of course,

two obvious problems with that holding. First, and most obviously, Trinity Lutheran did not bring a facial challenge here. As Judge Gruender explained, petitioner's challenge was plainly limited exclusively to the state's denial of its application. Pet.App.23a-25a. Indeed, petitioner's complaint bears this point out. *See, e.g.*, Pet.App.106a (challenging state's "unconstitutional application of [the Missouri Blaine Amendment] in denying the [petitioner]'s grant application"). The panel majority's eagerness to construe the complaint as mounting a facial challenge that Trinity Lutheran did not bring gets matters backwards. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008); *see also, e.g., Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006); *Renne v. Geary*, 501 U.S. 312, 324 (1991). Second, a single constitutional application of a provision motivated by improper animus, particularly where animus was neither raised nor addressed, would not preclude a facial challenge that focuses on its improper animus. The fact that an improperly motivated statute or constitutional provision is capable of benign application does not prevent a successful attack, whether facial or as-applied, on the basis of its improper motivation. *Cf. Johnson v. United States*, 135 S. Ct. 2551, 2560-61 (2015) (holding that facial constitutional attack is not defeated simply because statute may constitutionally be applied to some conduct); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (holding that statute constitutionally prohibiting some conduct is nevertheless unconstitutional when "it functions ... to suppress" religious practices).

Quite apart from the majority's errors concerning facial challenges, its fixation on *Luetkemeyer* is misplaced. The challenge in *Luetkemeyer* was premised on the notion that because the government provided a particular benefit—busing—to those who availed themselves of a particular public service—public schooling—it must also provide that same benefit to those who, like the plaintiffs' children, did not so avail themselves. *See Luetkemeyer*, 364 F. Supp. at 381-82. There was no allegation of government discrimination between private actors. Rather, the plaintiffs alleged discrimination between those who use a government benefit, and those who do not. Thus, *Luetkemeyer* is irrelevant to this case because the transportation services at issue there were not provided to *any* private school or institution. The only "discrimination" was between public schools and private schools, not between religious and secular private schools.

Petitioner's challenge in this case is far less grandiose. It contends only that when the government elects to provide neutral and generally available benefits to some private actors, it cannot be forced to deny those same benefits to others simply on the basis of their religion. *Luetkemeyer* has nothing to say on that question. Perhaps for that straightforward reason, respondent did not rely upon *Luetkemeyer* below. *See* Pet.App.24a (Gruender, J., concurring in part and dissenting in part). The majority divined the supposed relevance of that case on its own—a red flag that the case's relevance was vastly overstated.

Although the majority failed to "fully grappl[e] with" it, *see* Pet.App.23a (Gruender, J., concurring in

part and dissenting in part), *Locke* is ultimately the precedent on which the majority's opinion rises or falls. The majority read *Locke* to support its ruling that there "'are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.'" Pet.App.12a n.3 (quoting *Locke*, 540 U.S. at 719). Whatever those actions are, *Locke* did not consign states to being forced to choose between tolerating less safe playgrounds or compelled discrimination against religion. There is, to say the least, a material difference between state funding of theology degrees and state funding of safe playgrounds.

Locke involved a higher-education scholarship program pursuant to which the state provided college scholarships to qualifying students, but prohibited using the scholarships for theology degrees. 540 U.S. at 715-17. The Court held that, although the state was free to allow scholarship recipients to use the funds for theology degrees without violating the Establishment Clause, *id.* at 718-19, the Free Exercise Clause did not compel it to do so. The Court identified a tradition against "procuring taxpayer funds to support church leaders" dating to "the founding of our country." *Id.* at 722. Moreover, the Court held that the scholarship limitation imposed only a "relatively minor burden on" scholarship recipients, who remained free to use the scholarships to attend religiously affiliated schools and to take theology courses. *Id.* at 724-25.

Justice Scalia dissented. He warned that the Court's decision lacked any "logical limit" and could be deployed to "justify the singling out of religion for

exclusion from public programs in virtually any context." *Id.* at 730 (Scalia, J., dissenting).

The Chief Justice's response to Justice Scalia's dissent clarified just how limited was *Locke*'s holding. The Chief Justice explained that the decision was limited to the use of scholarships toward theology degrees because "the *only* interest at issue here is the State's interest in not funding the religious training of clergy." *Id.* at 722 n.5 (emphasis added). The Court explained the importance of that interest by highlighting the distinct concerns raised by state funding of religious training of clergy. "Training someone to lead a congregation is an essentially religious endeavor," a "distinct category of instruction" that is "akin to a religious calling" and different from "education for other callings." *Id.* at 721. There was a centuries-old tradition against public funding of such training, including that "[m]ost States" had "formal prohibitions against using tax funds to support the ministry." *Id.* at 723. The Court in *Locke* applied that longstanding concern about direct government funding of the core religious functions of the church itself to the specific context of higher education.

Finally, the Court observed that the law evinced no "hostility toward religion," but in fact went "a long way toward including religion in its benefits," including allowing public funding for theology courses, but not majors, at religious schools. *Id.* at 724. The burden on those desiring to study theology was thus "relatively minor." *Id.* at 725.

None of these concerns is present in this case. Including petitioner in the Scrap Tire Grant Program

would hardly have been a religious endeavor akin to teaching someone how to lead a congregation. The Eighth Circuit identified no tradition against including church playgrounds in otherwise neutral and generally available safety subsidies, apart from the very law being challenged. In-kind assistance to protect the safety of children is entirely secular. And unlike the scholarship program in *Locke*, the burden on religion is substantial: Petitioner is entirely excluded from the program, whereas the challenger in *Locke* was still free to take religion courses at religious educational institutions. *See id.* at 724-25. The Eighth Circuit's holding simply cannot be squared with either the limited rationale of *Locke* nor with the general principle of neutrality pervading Religion Clauses jurisprudence.

Not every court has so erroneously overread *Locke*. The Tenth Circuit, for example, observed that *Locke* "indicated that the State's latitude with respect to funding decisions has limits." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008). In particular, *Locke* "suggests, even if it does not hold, that the State's latitude to discriminate against religion ... does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Id.* The *Colorado Christian* court rejected the argument that, following *Locke*, "all 'state decisions about funding religious education'" are permissible so long as they are rational. *Id.* at 1254-55. And it went on to hold that Colorado could not bar "pervasively sectarian" institutions from receiving aid under a neutral and generally available college scholarship program. *Id.* at 1256.

Similarly, the Seventh Circuit in *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 (7th Cir. 2010), noted that the program in *Locke* allotted state funds for use "at pervasively sectarian colleges, where prayer and devotion were part of the instructional program; only training to become a minister was off limits." *Id.* at 780. In the case before it, the court concluded from the fact that the state refused to "support programs that include prayer or religious instruction" that the state "evince[d] hostility to religion." *Id.*

Of course, the Eighth Circuit and Colorado Supreme Court are not alone in their expansive interpretations of *Locke*. *See Eulitt ex rel. Eulitt v. Maine*, 386 F.3d 344, 355 (1st Cir. 2004) (declining "to cabin *Davey* ... to the context of funding instruction for those training to enter religious ministries"); *Bush v. Holmes*, 886 So. 2d 340 (Fla. Dist. Ct. App. 2004) (striking down a neutral and generally available scholarship program as providing impermissible aid to religious schools), *aff'd on other grounds*, 919 So. 2d 392, 398 (Fla. 2006). And the confusion surrounding *Locke* has not gone unnoticed in the academy. *See, e.g.*, Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 183-95 (2004); Thomas C. Berg, Response, *Religious Choice and Exclusions of Religion*, 157 U. Pa. L. Rev. PENNumbra 100, 108-09 (2008); *see also* Cleland B. Welton II, Note, *The Future of* Locke v. Davey, 96 Va. L. Rev. 1453, 1469 (2010) ("The Court's scattershot opinion leaves the future of the doctrine uncertain.").

Whatever confusion may exist about *Locke*'s holding should be resolved by the Religion Clauses' command of neutrality. *Locke* authorized discrimination only in the presence of specific, distinctive circumstances: The unique situation appertaining to the "vocational religious instruction" of clergy, which *Locke* concluded was "akin to a religious calling" and different from "education for other callings," 540 U.S. at 721, 725; the well-established tradition dating back to the Founding of withholding state funding for the "vocational religious instruction" of clergy, *id.* at 725; and the absence of hostility toward religion—and, indeed, affirmative steps towards its inclusion—in the law, making the burden on free exercise "relatively minor," *id.* at 724-25. In the absence of these circumstances, there is no warrant to depart from the most basic command of the Religion Clauses: The government may neither confer nor withhold benefits *because* of religion. The contrary reading of *Locke*—allowing almost unlimited discrimination against religion in the administration of otherwise neutral and generally available government aid—is not the "'play in the joints' between" the Free Exercise and Establishment Clauses that *Locke* described, *id.* at 718; it is a complete break from our constitutional commitment to neutrality as reflected in multiple constitutional provisions.

First, the Establishment Clause not only prohibits discrimination among religions, *see Larsen v. Valente*, 456 U.S. 228, 244 (1982), but also guards against "trolling through a person's or institution's religious beliefs," *Mitchell*, 530 U.S. at 828 (plurality opinion); *see also Rosenberger*, 515 U.S. at 844; *NLRB*

v. Catholic Bishop of Chi., 440 U.S. 490, 502 (1979). The federal courts of appeals have thus repeatedly held that the Establishment Clause "protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices" in connection with "exclusion from benefits." *Colo. Christian*, 534 F.3d at 1261; *see also Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340-42 (D.C. Cir. 2002); *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 501-04 (4th Cir. 2001). The Eighth Circuit's reasoning, however, authorizes that very inquiry, since a government could not very well decide which potential recipients of otherwise neutral and generally applicable government aid are "sectarian" within the meaning of the Missouri Blaine Amendment without an inquiry into the recipient's beliefs, practices, structure, and activities. Not every potential recipient will have the word "church" in its name.

Second, laws "involving discrimination on the basis of religion ... are subject to heightened scrutiny" under the Equal Protection Clause. *Colo. Christian*, 534 F.3d at 1266. They are permissible only if narrowly tailored to further a compelling governmental interest. *E.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005). Interpreting the Missouri Blaine Amendment to require the exclusion of religious people and institutions from receiving otherwise neutral and generally available aid plainly is "discrimination on the basis of religion" that is not narrowly tailored to further any compelling governmental interest. The only possible interest justifying such an infringement—and the only one identified by the Eighth Circuit majority—is an antiestablishment interest, but the lower court's

treatment of the First Amendment question both *engenders* establishment concerns by authorizing an inquisition into an aid recipient's religious beliefs, and departs from the neutrality principles underlying the federal Establishment Clause. The Missouri provision in question does not ameliorate a potential Establishment Clause problem; it creates one.

B. The Colorado Supreme Court's Invalidation of an Indirect Aid Program Materially Indistinguishable from the Program Upheld by this Court in *Zelman* Underscores the Threat to Neutrality.

The Colorado Supreme Court's decision in *Douglas County* underscores that the mistaken logic unleashed by an overreading of *Locke* is not easily cabined. Not content to compel discrimination in the context of direct aid, the Colorado Supreme Court did the Eighth Circuit one better and compelled discrimination in the context of indirect aid—of a neutral government program in which no moneys reach religious schools except by virtue of the intervening and independent choices of parents and students.

The Eighth Circuit's decision is plainly wrong even in the context of direct aid, but the Colorado Supreme Court's invalidation of the Scholarship Program on similar reasoning underscores the threat to the broader constitutional commitment to neutrality. This Court has repeatedly emphasized that the presence of intervening and independent decisions as a "circuit breaker" between government funding and religious institutions is a particularly

powerful "way of assuring neutrality." *Mitchell*, 530 U.S. at 810 (plurality opinion). If "numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." *Id.* (quotation marks omitted). Furthermore, "[p]rivate choice also helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program and that could lead to a program inadvertently favoring one religion or favoring religious private schools in general over nonreligious ones." *Id.* (citation omitted)

An unbroken string of cases supports these principles. *See, e.g.*, *Mueller v. Allen*, 463 U.S. 388, 392 (1983); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 484 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 4-5 (1993); *Agostini v. Felton*, 521 U.S. 203, 225-26 (1997).

Most recently, of course, the Supreme Court held in *Zelman* that a school choice program substantively identical to the Scholarship Program complies with the Establishment Clause. The program in *Zelman* provided aid directly to parents of qualifying students to be used to cover tuition at a private school of their choice without regard to the religious identity of the school. 536 U.S. at 646-47. Ninety-six percent of aid recipients attended religious schools, and eighty-two percent of participating private schools had a religious affiliation. *Id.* at 647. The Court held that, "where a government aid program is neutral with respect to religion, and provides assistance directly to a broad

class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." *Id.* at 652.

The Scholarship Program is substantively identical to—in fact, modeled after—the program in *Zelman*. It is equally neutral when it comes to religion. Religiously affiliated schools do not provide only, or even primarily, religious instruction. They teach a full secular curriculum and satisfy the state's compulsory education requirements, which is precisely why they have been included in a neutral government program. *See, e.g., Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 245-47 (1968). And, indeed, all private schools that applied to the Program were evaluated solely on whether they could provide a quality education, without regard to religion. *See Douglas Cty.*, 356 P.3d at 850 (noting that the Scholarship Program "is neutral toward religion generally and toward religion-affiliated schools specifically"). Under the Program, all participating private schools had to produce student achievement and growth results for scholarship recipients at least as strong as the District's public schools.

The Scholarship Program thus poses none of the dangers at issue in *Locke*. Whereas giving the petitioner in *Locke* his scholarship could be viewed as exclusively or primarily funding a religious function, the Scholarship Program indisputably funds the education of children in state-mandated secular subjects, in either a secular or religious environment,

as the children and their parents choose. That is fully consistent with the Establishment Clause, and this Court has refused to countenance encroachments upon some other constitutional protection when "the posited fears of an Establishment Clause violation are unfounded." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993); *see also Widmar v. Vincent*, 454 U.S. 263, 271-72, 276 (1981).

None of this is to suggest that there is any Establishment Clause danger posed by the Scrap Tire Grant Program. That Program has its own guarantees of neutrality, and saying that all playgrounds can benefit from the Program, except those provided by religious entities, is a significant departure from a commitment to wholesome neutrality. But the Colorado Supreme Court decision in *Douglas County* demonstrates that once *Locke* is read to sanction discrimination against religion outside the narrow context of government funded theological degrees, there is no logical stopping point. Whereas the intervening and independent role of parents and students was an important guarantee of neutrality in the view of this Court, it was immaterial in the eyes of the Colorado Supreme Court in *Douglas County*. This Court should put this pernicious genie back in the bottle here, reverse the Eighth Circuit, and ultimately grant, vacate and remand in *Douglas County*. But if this Court declines to resolve the issue here, it should ultimately make clear that states and localities cannot be forced to discriminate against

religion in the context of indirect neutral aid programs.[3]

III. Pervasive Anti-Catholicism Underlies Both Blaine Amendments.

Underlying both Article I, §7 of the Missouri Constitution and Article IX, §7 of the Colorado Constitution is the virulent anti-Catholic animus that dominated American domestic politics in the decade following the Civil War. Both provisions are products of that bias.

The enactment history of the provisions matters and is itself grounds for reversal. This Court has repeatedly held that laws singling out a group for mistreatment on the basis of animus toward that group violates the Constitution. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632 (1996) (provision of Colorado Constitution "inexplicable by anything but animus toward the class it affects" lacks a rational basis); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("mere negative attitudes, or fear" cannot justify legislation targeting a particular group); *Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (striking down facially neutral provision of Alabama constitution on ground that enactment history revealed that its enactment was tainted by racial animus); *cf. Palmore v. Sidoti*, 466 U.S. 429, 433

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[3] *Douglas County* illustrates the dangers inherent in the Eighth Circuit's approach in one additional respect. While the Eighth Circuit's reasoning created an inchoate danger of searching inquiries into the depth of religious commitment or the pervasiveness of religious values, that inchoate threat was realized in the district court proceedings in the *Douglas County* case. Dist.Ct.Op.9-12; *Douglas Cty.*, 356 P.3d at 848.

(1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). In *Church of the Lukumi Babalu Aye*, for example, this Court struck down a local ordinance forbidding animal sacrifices as the product of discrimination against a particular religious group. 508 U.S. at 534-35. Although bias did not appear on the face of the statute, this Court held that "[f]acial neutrality is not determinative" and looked behind the text to the ordinance's enactment history for evidence of religious targeting or "covert suppression of particular religious beliefs." *Id.* at 534 (quotation marks omitted). And in *Locke*, this Court affirmed that "hostility toward religion" renders a refusal to fund constitutionally suspect. 540 U.S. at 724.

A. The Federal Blaine Amendment

From the Nation's founding until the mid-nineteenth century, Protestantism enjoyed unrivaled dominance over the nation's religious and civic landscape. A general Protestant morality was widely seen as a necessary prerequisite to the maintenance of the American constitutional republic. *See* Frederick Mark Gedicks, *Reconstructing the Blaine Amendments*, 2 First Amend. L. Rev. 85, 91-92 (2003). "Many people viewed Protestantism as inseparable from the American republican idea," Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* 57 (2000), even as synonymous with "Americanism," John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 297 (2001) (quotation marks omitted).

Protestant hegemony was particularly evident in American education. The first publicly funded school systems—the common schools—served as important tools for inculcating civic Protestant values in their students. Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & Pol. 65, 72-73 (2002). At a time when conservative and liberal Protestants disagreed on fundamental theological questions, the common schools' curricula "evidenced a 'pan-Protestant compromise, a vague and inclusive Protestantism' designed to tranquilize conflict among Protestant denominations." Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 503 (2003) (quoting Jeffries & Ryan, *supra*, at 299). This curriculum was denominated "nonsectarian." But it certainly was not secular. Its centerpiece was reading from a Protestant version of the Bible, *see* Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 666 (1998), and it also included prayers and hymns while "simultaneously refus[ing] to allow more particularized kinds of religious instruction," Christopher C. Lund, *The New Victims of the Old Anti-Catholicism*, 44 Conn. L. Rev. 1001, 1006 (2012). Nonsectarian education was therefore a form of Protestant religious education. *Id.*

This homogenized, "nonsectarian" Protestantism necessarily excluded Roman Catholicism. Many Protestants believed that their new nation's greatness lay in its rejection of the superstitious customs and traditions of the Old World. *See* Macedo, *supra*, at 59-61. They regarded Catholicism as part of that discarded Old World, and the Catholic Church as a

corrupt and loathsome foreign power. *See* Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 First Amend. L. Rev. 46, 63-64 (2003); Philip C. Hamburger, *Separation of Church and State* 232-36, 436 n.112 (2002).

The wave of Catholic immigration beginning in the mid-nineteenth century brought these prejudices to the fore. *See* Hamburger, *supra*, at 201-02. Unsurprisingly, Catholics frequently refused to simply accept the openly Protestant instruction dominating the common schools. Protestants saw the Catholic refusal to participate in "nonsectarian" public school practices like Bible reading, hymn singing, and prayer as a failure to assimilate and a rejection of core values of American civic culture. *See id.* at 211; Charles L. Glenn, *The American Model of State and School* 154-60 (2012). Catholics established their own parochial schools and tried to break the monopoly on state funding for Protestant education by lobbying for a share of common school funds. *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 42 (1992). Although initially rebuffed, Catholics were gradually able to gain access to funding for parochial schools or excise Protestant practices from public schools in cities with large Catholic populations. *Id.* at 44-47.

These efforts were met frequently with a prejudice and nativism endemic of the broader anti-Catholic brand of politics that had emerged in response to swelling Catholic numbers. *See generally* Hamburger, *supra*, at 201-40; *see also* Jeffries & Ryan, *supra*, at 301. These politics reached a fevered pitch after the Civil War. In 1875, President Grant

delivered an address denouncing the forces of "superstition" and calling for citizens to "resolve that not one dollar ... be appropriated to the support of any sectarian schools." Duncan, *supra*, at 507 (quotation marks and emphasis omitted). The reference to "sectarian schools" had an unmistakable public meaning to Grant's audience. It meant Catholic—the antithesis of the "nonsectarian" Protestant public schools of the era. *See* Jeffries & Ryan, *supra*, at 301; Hamburger, *supra*, at 298-99, 307; *cf. Mitchell*, 530 U.S. at 828 (plurality opinion); *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting); Richard A. Baer, Jr., *The Supreme Court's Discriminatory Use of the Term "Sectarian,"* 6 J.L. & Pol. 449 (1990). Grant's nonsectarianism was not an appeal to build a high wall of separation between church and state—its proponents were only too happy to maintain funding for "nonsectarian" (*i.e.*, Protestant) public schools—but simply reflected an interest in discriminating against Catholic practices and institutions.

Grant also called for a constitutional amendment forbidding funding for "sectarian" schools. Steven K. Green, *The Bible, the School, and the Constitution* 192-93 (2012). Shortly thereafter, Representative James Blaine of Maine obliged and introduced an amendment, which read in relevant part:

> [N]o money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be

> divided between religious sects or denominations.

4 Cong. Rec. 205 (1875). The House approved the amendment, but it died in the Senate as Senators opposing it assailed its patently anti-Catholic purpose and effect. Green, *Blaine Reconsidered*, *supra*, at 39.

B. The Blaine Amendments in the States

As Blaine's Amendment failed in Congress, advocates of such measures turned to the states. Within a year of its defeat, fourteen states had adopted measures forbidding public funding for "sectarian" schools, and thirty states had adopted such provisions by the 1890s. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 573 (2003). Among them were Colorado and Missouri.

1. Colorado's Blaine Amendment

As set forth in the unrebutted factual record in the *Douglas County* case, Colorado's constitutional convention opened in December 1875, the same month that President Grant called for a constitutional amendment and Representative Blaine answered his call. Tr.670:23-671:05; Green, *Blaine Reconsidered*, *supra*, at 52-53.[4] The state's Catholic population—which, unlike the Protestant majority, was heavily Mexican-American—was wildly underrepresented at the convention, which was held in the Denver lodge of a secret society that refused to admit Catholics. *See Proceedings of the Constitutional Convention Held*

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[4] "Tr." refers to the transcript of the evidentiary hearing before the district court in *Douglas County*.

in Denver, December 20, 1875 to Frame a Constitution for the State of Colorado 15 (1907) ("*Proceedings*"); Glenn, *supra*, at 170-71; Tr.671:17-21, 676:7-677:8.

The Convention moved quickly to address the school funding question. *See* Tr.672:10-14. As some delegates expressed concern that Congress might not admit Colorado to the union if the convention failed to prohibit funding of "sectarian" schools, *see Proceedings* at 278; Tr.691:6-16, former territorial governor John Evans petitioned the Convention on behalf of a group of Protestant churches to keep public schools "free from sectarian" influence, prohibit diversion of funds to Catholic schools, and allow Bible reading in public schools, *see Proceedings* at 87, 111-13, 277; Tr.679:5-680:25.

The future first Catholic bishop of Denver called for leaving the "question of separate schools and denominational education" to future legislative judgment, "when the passions of th[e] hour will have subsided." *Proceedings* at 235, 330-31; *see also* Glenn, *supra*, at 172-73. These comments—hardly unreasonable—sparked a furious reaction and laid bare the anti-Catholicism which pervaded the convention. *See* Glenn, *supra*, at 170 ("That prejudice existed among the Protestant majority there can be no doubt."). Former governor Evans noted privately that the remarks gave him an opening to "stir ... up" the anti-Catholic elements of the majority, Donald W. Hensel, *Religion and the Writing of the Colorado Constitution*, 30 Church Hist. 349, 352 (1961), and the press railed against Catholic influence in Colorado's educational and political systems, *see* Glenn, *supra*, at 171 (quoting *Rocky Mountain News*, Jan. 11, 1876);

id. at 172 (quoting *Boulder County News*, Jan. 21, 1876); *see also* Hensel, *supra*, at 356.

Ultimately, the convention adopted the Colorado Blaine Amendment. Of the eight Catholic delegates who participated in the Convention, *none* voted in favor of the Amendment. *See* Hensel, *supra*, at 353-54; *Proceedings* at 357-58. A Denver newspaper praised the Convention's decision to adopt "'Mr. Blaine's amendment'" which had "'struck a chord in the average American breast that has not yet ceased vibrating'" such that "'far more protestants can be got to vote for the constitution on account of this very clause than catholics for the same reason to vote against it.'" Glenn, *supra*, at 173 (quoting *Rocky Mountain News*, Mar. 17, 1876). Article IX, §7 has not been amended, reenacted, or reauthorized since 1876, and the taint of the animus that fueled its enactment remains unmitigated.

2. Missouri's Blaine Amendment

Missouri was hardly immune from the anti-Catholic politics which held the federal capital and Denver in thrall. Following the elections of 1854, for example, rabidly anti-Catholic Know-Nothings violently attacked Irish Catholic immigrants and looted Irish homes, and threatened to attack local parishes. *See* IV *Encyclopedia of the History of St. Louis* 1917 (W. Hyde & H.L. Conard eds., 1899); Archdiocese of St. Louis, *1843-1903: The Immigrant Church*, http://bit.ly/1SsZ854. In 1870, the superintendent of Missouri's public schools called on the state legislature to propose a constitutional amendment that would prohibit the funding of non-public schools. *See* J. Michael Hoey, *Missouri*

Education at the Crossroads: the Phelan Miscalculation and the Education Amendment of 1870, 95 Mo. Hist. Rev. 372, 373 (2001). His call was explicitly anti-Catholic, criticizing New York's decision to fund Catholic schools and condemning those who "publicly assert the incompatibility of public schools and their church." *Id.* at 374.

The legislature complied, proposing Article IX, §8 in 1870. The Constitutional Convention convened in May 1875, nearly contemporaneously with President Grant's speech and Blaine's introduction of his amendment in the House of Representatives. *See* I *Journal: Missouri Constitutional Convention of 1875*, at 113 (I. Loeb & F. Shoemaker eds., 1920). As delegates debated the Blaine Amendment, the *New York Tribune* quoted a St. Louis newspaper in observing that, in the context of the debate over public funding of Catholic schools, "[t]he sign of the times all indicate an intention on the part of the managers of the Republican party to institute a general war against the Catholic Church." *N.Y. Trib.*, July 8, 1875, at 4 (quotation marks omitted). The Convention then approved Article I, §7 and Article IX, §8 nearly concurrently with Congress' consideration of the Blaine Amendment. *See* I *Journal: Missouri Constitutional Convention of 1875*, at 186-87, 194-95, 261; II *Journal: Missouri Constitutional Convention of 1875*, at 526, 596-97 (I. Loeb & F. Shoemaker eds., 1920).

The anti-Catholic origins of the Colorado and Missouri Blaine Amendment have manifested themselves in contemporary decisions of the Eighth Circuit and Colorado Supreme Court sanctioning—

indeed, compelling—discrimination against all religions. That these provisions "born of bigotry," *Mitchell*, 530 U.S. at 829 (plurality opinion), continue to give cover of law to discrimination against religion is reason enough for this Court to consider them, lay their ugly origins bare, and invalidate them. If there is any obstacle to doing so in this case, the Court should do so in *Douglas County*. But either way, the animus of the past cannot be allowed to continue to justify contemporary discrimination.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Eighth Circuit.

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No. 15-577

In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* ETHICS & RELIGIOUS LIBERTY COMMISSION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Ethics & Religious Liberty Commission ("ERLC") is the public policy and engagement arm of the Southern Baptist Convention. With more than 15 million members and over 46,000 churches nationwide the Southern Baptist Convention is America's largest Protestant denomination. The ERLC is charged with addressing public policy affecting such issues as freedom of speech, religious liberty, marriage and family, the sanctity of human life, and ethics.

Religious freedom is an indispensable, bedrock value for Southern Baptists. The ERLC engages culture with the gospel of Jesus Christ by speaking in the public square for the protection of religious liberty and human flourishing. The correlated guarantee of freedom from government interference in matters of faith protects church members by fostering a society where religious adherents from all faiths may follow the dictates of their conscience in the exercise of religion.

The thousands of churches represented by the ERLC have an interest in not being discriminated against in government aid programs, like the playground resurfacing program in Missouri at issue in this case. For the same reasons Trinity Lutheran

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici and their counsel, make a monetary contribution to the preparation or submission of this brief. The parties consented to this filing. Their letters of consent are on file with the Clerk. As required by Rule 37.2(a).

Church of Columbia was prevented from receiving a government grant, any given Southern Baptist congregation could likewise be prevented from participating in government programs purely on the basis of religion. The ERLC brings a unique perspective on the impact of religious liberty decisions throughout the nation.

SUMMARY OF ARGUMENT

Americans are appropriately apprehensive about the government becoming entangled with religion. Missouri has a grant program to resurface playgrounds using recycled tires and it categorically excludes churches from participating in the otherwise neutral grant program. Trinity Lutheran's meritorious application was rejected for one reason: it was a church. The scads of cases parsing the Establishment Clause often present difficult line drawing problems for the Court. Despite Missouri's protestation to the contrary, this case can be decided without relying on finer points of Establishment Clause doctrine. Nobody need fear an established church by means of a recycled tire surface on a playground.

As one argument to try and justify the express discrimination against any religious applicant from participating in the scrap tire recycling grant program, Missouri and the Eighth Circuit majority invoke the "direct" nature of the grant funding. The argument seeks refuge in *Locke v. Davey*'s comment about a break in the link of government funding for Establishment Clause purposes. 540 U.S. 712, 719 (2004). This argument is a distraction from the core challenge to Missouri's status based discrimination

against religion. Questions of direct or indirect funding are outdated even within proper Establishment Clause cases. Furthermore, the unique considerations of government funding for religious schools cannot be readily applied to a general government aid program, as this case features, where there is an admitted lack of any serious risk of the government action establishing a state religion.

The ERLC is concerned not only with the unjustified treatment of Trinity Lutheran Church in this case but also with the overall trend of churches and religious actors being excluded from participating in government programs. This disturbing trend cuts against the values undergirding the Free Exercise, Establishment, and Equal Protection Clauses, which protect religion from being treated with hostility. Missouri's express discrimination against religion should be declared unconstitutional.

ARGUMENT

I. The difference between direct and indirect funding cannot save Missouri's targeted exclusion of Trinity Lutheran Church from a neutral and secular aid program.

Missouri's Playground Scrap Tire Material Grants program has been applied to exclude The Learning Center operated by Trinity Lutheran Church—or any other church or childcare facility connected with a church—purely because of religious status. Missouri highlights how the grant funding would have gone directly to the daycare being run by a church as one reason the exclusion withstands

constitutional scrutiny. According to Missouri, the "decision regarding who would receive the state funds here was a governmental one." Opp. to Cert. at 4.

The Eighth Circuit majority, too, played up the funding path as a reason the religious exclusion was justified. *Trinity Lutheran Church of Columbia v. Pauley*, 788 F.3d 779, 784 (8th Cir. 2015). The Eighth Circuit noted the challenged program would "provide public grant money directly to a church" and, thus, "in this case there is no break in the link." *Id.* at 784, 785. This was deemed important because "In *Locke*, 'the link between government funds and religious training [was] broken by the independent and private choice of [scholarship] recipients.' " *Id.* at 785 (citing 540 U.S. at 719). This argument is a red herring.

While the path of government funds has featured prominently in this Court's many Establishment Clause cases challenging government support for religious schools, it has never been used to justify a targeted exclusion of religious applications from a program of general, secular government aid. Exclusion of religious actors from public life, as happened to The Learning Center, should not be given a pass merely because the government plays the role of awarding funds to applicants without an intermediary. The distinction between direct or indirect funding has no purchase in this case. If anything, the path of government funding should be limited to Establishment Clause challenges of government funding of religious education; not government recycling grants to improve child safety on playgrounds.

A. The Establishment Clause considerations of direct or indirect funding does not justify excluding religious actors from government aid.

Reliance on the mechanism for distributing government aid is particularly inappropriate here where Missouri (and the Eighth Circuit) make no argument that it would violate the Establishment Clause to permit The Learning Center to receive a scrap tire recycling program grant. *See Trinity Lutheran Church of Columbia*, 788 F.3d at 784 (noting "it now seems rather clear that Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire grant program without violating the Establishment Clause.").

As an initial matter, the lack of any "break in the link" of funding as noted by the court below simply does not apply. *Id.* at 785. There is no claimed Establishment Clause bar to the neutral and secular aid program at issue. Regardless, the source of funding should not drive any determination of the issues in this case.

1. Consideration of direct or indirect funding should be limited to Establishment Clause challenges in the context of education.

The distinction between direct and indirect funding has a shaky foundation that has largely been displaced by considerations of the independent and private choice of individuals as a means of preventing religious indoctrination in schools from being attributed to the government. To be sure, this Court has frequently meted the bounds of government

funding or support for religious education. In those cases there are special concerns about "whether governmental aid to religious schools results in governmental indoctrination" which is "ultimately a question [of] whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action." *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality).[2]

Under the Establishment Clause neutrality is the solution to the problem of government-attributed religious indoctrination. The principle of neutrality undermines any potential for linking religious instruction to the government since "[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." *Id.* at 809. Government funding that is "indirect" is better understood as government aid flowing "as a result of the genuinely independent and private choice of individuals," which fosters true neutrality and defeats any charge of establishing religion. *Id.* at 810; *see also Agostini v. Felton*, 521 U.S. 203, 226 (1997).

In this context of Establishment Clause concerns with the government being held responsible for religious indoctrination, courts have occasionally spoke of 'breaking the link' of government funds, often through private, independent choice. *Locke v. Davey* thus cited a string of school aid Establishment Clause

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[2] While a plurality opinion, *Mitchell* represents this Court's most exhaustive and helpful review of the Establishment Clause challenges to religious education support.

cases as supporting the 'break in the link' concept. *See Locke*, 540 U.S. at 719 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 13–14 (1993); *Witters v. Wash. Dept. of Servs. for Blind*, 474 U.S. 481, 487 (1986); *Mueller v. Allen*, 463 U.S. 388, 399–400 (1983)); *see also Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995) (collecting cases).

Zelman, *Zobrest*, *Witters*, and *Mueller* are all Establishment Clause cases involving religious schools. None involve a general government aid program as prosaic as converting recycled tires to playground surfaces. The same line of cases, with the addition of *Agostini* (another Establishment Clause education case) served as the basis of *Mitchell*'s discussion of the principle of neutrality operating through independent and private choice. 530 U.S. at 810–11. None of these cases bear a resemblance to the neutral, secular aid program at issue here.

- *Agostini* was a challenge to Title I funds being used for teachers to provide services, for a defined class of students, directly at private, religious schools. 521 U.S. at 210–11.

- *Zobrest* involved a sign language interpreter, supported by government funds, working at a Catholic School and interpreting classes including Catholic doctrine. 509 U.S. at 4.

- *Witters* involved aid for a tuition grant for a blind student to attend a Christian college for studies, even study to be a missionary. 474 U.S. at 483.

- *Mueller* was a challenge to an education expense tax deduction used by many individuals to offset tuition to attend religious schools. 463 U.S. at 391–92.

The tradition of relying on free and independent choice to prevent government aid from creating an Establishment Clause concern has continued after *Mitchell*. In *Zelman v. Simmons-Harris* this Court approved Cleveland's voucher program, noting "*Mueller*, *Witters*, and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." 536 U.S. 639, 652 (2002). The Court found the voucher program "entirely neutral with respect to religion" because it permits "individuals to exercise genuine choice among options public and private, secular and religious." *Id.* at 662. The program complied with the Establishment Clause.

The role of free and independent choice in directing government aid (making it indirect) has been repeatedly relied on in the unique context of Establishment Clause challenges to government aid programs supporting religious education—not

general and secular government aid programs as challenged here.

2. *Even for Establishment Clause challenges, breaking the link of direct government funding is not required.*

The role of private and independent choice in mediating government funding for religious education endeavors should not be over-stated. While private and independent choice certainly diminishes or defeats any unconstitutional establishment of religion, it is by no means a necessary condition for government aid of religious education to stand. While a great many of this Court's Establishment Clause cases involving education have relied upon the role of free and independent choice, it has never been deemed a requirement. For instance, the Court has also upheld a number of programs where aid was distributed directly to religious organizations without the intermediary role of private choice.

- *Committee for Public Education & Religious Liberty v. Regan* upheld a state reimbursement scheme for schools administering state required testing, for both secular and religious schools. 444 U.S. 646, 656–59, 1 (1980).

- *Roemer v. Board of Public Works of Maryland* upheld a grant program that allowed grants, based on number of full-time students, to be given to both secular and religious institutions of higher education. According to the Court, "religious institutions need not be quarantined from public benefits that are neutrally

available to all." 426 U.S. 736, 740–43, 746 (1976).

- *Hunt v. McNair* upheld a state law providing for bond financing for education facilities, including both secular and religious institutions of higher education. 413 U.S. 734, 736, 744 (1973).

Thus, the break in the "link" mentioned in *Locke* is not a requirement even in cases under the Establishment Clause, even involving aid to religious schools. *See also Trinity Lutheran Church of Columbia*, 788 F.3d at 791 (Gruender, J., dissenting) ("*Locke* did not leave states with unfettered discretion to exclude the religious from generally available public benefits.").

B. Diminished Establishment Clause concerns from scrap tire playground resurfacing alleviate any need to distinguish direct from indirect aid.

The importance of tracing the path of government funding in the Establishment Clause context is open to debate. *Compare Mitchell*, 530 U.S. at 815–16 (calling into question "the distinction between direct and indirect aid"), *with School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 394–95 (1985), (relying on distinction between direct and indirect aid), *overruled on other grounds by*, *Agostini*, 521 U.S. at 218. Some commenters and cases prefer to speak of all government funding in the dichotomy of direct or indirect funding while others prefer to speak of the role of private and independent choice defeating any

attribution of religious indoctrination to the government. That question need not be addressed to resolve this case. Direct or indirect funding of religious education, like the role of genuinely private and independent choice, works to allay Establishment Clause concerns with government subsidization of religion. *See Mitchell*, 530 U.S. at 815–16.

Missouri's targeted exclusion of religion cannot be justified by pointing to the government's concerns that a challenged action might violate the Establishment Clause because the grant lacks a "break in the link" from the government to the recipient, The Learning Center. Its reliance on the Missouri Constitution's exclusionary provision must conform to the U.S. Constitution's Free Exercise and Equal Protection Clauses. And the Missouri Constitution makes no reliance on the direct or indirect nature of funding, as it expressly prohibits both aid to a church either "directly or indirectly." *See* Mo. Const. art. I, § 7 ("no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion…").

In addition to the Establishment Clause doctrine not applying to Trinity Lutheran's claims, the line of cases which have featured the distinction between direct or indirect funding come from challenges to government programs with palpably higher risk under the Court's criteria of establishing a religion or otherwise entangling the government with activities that are "essentially religious endeavor." *Locke*, 540 U.S. at 721. By contrast, this case involves a scrap tire recycling program and the resurfacing of playgrounds. Whatever the wisdom of such a grant

program, it cannot seriously be said to risk violating any of the Court's Establishment Clause concerns. A playground surface at The Learning Center cannot be distinguished from a playground surface at any other daycare or public school.

Consider other hypothetical government aid programs that focus on either benefiting the environment through recycling, or by improving child safety (both prominent government purposes behind the scrap tire program). Would it ever establish a religion to include religious schools in an otherwise generally available recycling program? Surely picking up a recycling bin at The Learning Center, using governing funding, just as the government could do so for other businesses and schools, would never be considered a risk of establishing a state religion. Likewise, a hypothetical government program providing daycares with subsidies for car seats which improved safety features would, if given to The Learning Center alongside the myriad of other daycares in Missouri, never seriously be confused with government activity that rises to the level of establishing a religion.

This is a far cry from government funds being used for an interpreter who provides sign language interpretation of a Catholic Doctrine class, *Zobrest*, 509 U.S. at 4, nor of government funds being used for general tuition at religious school, *Zelman*, 536 U.S. at 652. Nor can this case be compared to government aid for blind students who choose to attend a Christian college and who are free to study to be a missionary, *Witters*, 474 U.S. at 483. Whether right or wrong, these cases all involved activity arguably

rising to the level of an established religion, under the Court's traditional concerns. The same cannot be said of The Learning Center's ability to patriciate the scrap tire recycling program.

The level of government involvement with religious activity relates to the argument that Missouri's "direct" grant program should be permitted to exclude religion because it was not sufficiently "indirect" or mediated by free and independent choice in the same way as school vouchers were in *Zelman*. There is no serious Establishment Clause concern or risks from including The Learning Center in the scrap tire recycling grant program. Thus, the flow of government funding through the grant program is legally insignificant in justifying the targeted exclusion of religion. Because there is no proper Establishment Clause objection to Missouri's scrap tire recycling program, the question becomes one of reviewing Missouri's express exclusion of The Learning Center purely because of its religious status.

Allowing the Learning Center to participate in a recycled tire grant program falls well short of the established religion risks of the education line of cases. Allowing churches to participate in secular government aid programs like the Missouri scrap tire program is far closer to general government programs such as fire and sewer services than it is to the educational indoctrination concerns or government funding of essentially religious endeavor. The path of funding provides no defense for Missouri's targeted exclusion of religion.

II. Churches should be allowed to participate in government programs on equal footing with other civic organizations.

America has always enjoyed the presence of churches in civic life. Our nation was founded with the prevalent belief that religion provides a moral foundation necessary for successful republican self-government. The mediating role of churches in society is no less valuable today than at the time of the founding.

The commitment to religious liberty as enshrined in the First Amendment provides freedom to every church to pursue its own spiritual ends. Those ends frequently include valuable contributions to the community, including social services, education, and other acts of mutual aid and benevolence to citizens in need. To so operate, churches must be free from undue interference from civic powers to pursue ministry in its many forms.

The uniquely American experience with religious pluralism and the protection of free exercise of religion means most churches do not want government-sponsored or government-established religion. All too often government-sponsored religion interferes with a church's ability to live out a religious faith free from government meddling.

Religious views, along with any other sincere views, must be welcomed on equal terms in civil society. Indeed, "the pluralist model is based on the accommodation position ... government accommodation of all people's rights to express, or refrain from expressing, religious convictions and religious beliefs." Richard Land, *The Divided States of*

America 76 (2011). Embracing a pluralistic society with many competing religious faiths will mean "no one is penalized for his or her views; neither those with religiously informed moral values, nor those with religion-free convictions." *Id.* at 174.

In James Madison's 1785 *Memorial and Remonstrance Against Religious Assessments*, the influential Founding Father opposed a bill to provide for established government religious teachers on two grounds. First, he opposed it on the basis of conscience because the "religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." Second, he opposed it on the grounds of equality as "the Bill violates that equality which ought to be the basis of every law ... all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights."[3]

As this Court put it more recently, "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, 505 U.S. 577, 589 (1992). Indeed, the "design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." *Id.*

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[3]Available at http://founders.archives.gov/documents/Madison/01-08-02-0163

The freedom of the religious sphere to operate without government coercion does not, however, necessitate a clinically secular state where religious actors are kept from public life. Government can, and should, accommodate religiously-neutral actors in government programs, allowing participation on an equal basis for religious and non-religious constituents.

The alternative, excluding church and religion from otherwise neutral government programs, would not fulfill the "benevolent neutrality" the Court has long embraced whereby "State power is no more to be used so as to handicap religions, than it is to favor them." *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 669 (1970) (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). A broad exclusion of religion is not neutral, let alone benevolent.

The Ethics & Religious Liberty Commission defends the right of churches throughout the country to enjoy religious freedom. It is concerned that this Court's Religion Clause precedent is being misunderstood and misapplied by lower courts to sanction discrimination against churches.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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RECORD AND BRIEFS

No. 15-577

In The
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
PETITIONER

v.

SARAH PARKER PAULEY, DIRECTOR,
MISSOURI DEPARTMENT OF NATURAL RESOURCES,
IN HER OFFICIAL CAPACITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE GENERAL COUNCIL OF THE ASSEMBLIES OF GOD AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether Missouri's refusal to allow Trinity Lutheran to participate in a secular aid program intended to improve playground safety, solely because it is a religious organization, violated the Free Exercise Clause.

2. Whether this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), permitted Missouri to exclude Trinity Lutheran from participation in a secular aid program solely because it is a religious organization.

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BRIEF FOR GENERAL COUNCIL OF THE ASSEMBLIES OF GOD (USA) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief is submitted on behalf of the General Council of the Assemblies of God (USA).[1]

INTEREST OF *AMICUS CURIAE*

The General Council of the Assemblies of God (USA), together with Assemblies of God congregations around the world, is the world's largest Pentecostal denomination. It has approximately 67 million members and adherents worldwide. Its national office is located in Springfield, Missouri.

The Assemblies of God operates seventeen colleges and universities in the United States. Local congregations also operate schools throughout the United States, and the Assemblies of God participates in the Association of Christian Teachers and Schools.

Because it is headquartered in Missouri, the Assemblies of God is concerned with the application to its operations, including to its schools, colleges, and universities, of Article I, § 7, of the Missouri Constitution.

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

Religious freedom is critically important to the Assemblies of God. As part of its religious mission, the Assemblies of God actively shares the gospel of Jesus Christ in this country and around the world. It cherishes the constitutionally-guaranteed freedom of religion, and it seeks to foster a society in which religious adherents of all faiths may follow the dictates of their conscience.

The Assemblies of God also has a keen interest in not being discriminated against because of its religious mission. The Eighth Circuit's decision, if allowed to stand, would impede the Assemblies of God's educational efforts and deprive its congregations of the benefits afforded to all of the other citizens of Missouri.

INTRODUCTION AND SUMMARY OF ARGUMENT

No state may, without violating the Free Exercise Clause, single out religious organizations for discriminatory treatment. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 538 (1993). A state violates the Free Exercise Clause if it "discriminates against some or all religious beliefs." *Id.* at 532.

Missouri created a program to assist non-profit organizations in purchasing recycled tires for use in improving the safety of school playgrounds. Trinity Lutheran applied for assistance and, without any dispute, qualified to participate in the program. But Missouri refused Trinity Lutheran's application solely because it is a religious organization. Missouri based its decision on Article I, § 7 of its Constitution, which prohibits using state funds to aid churches.

This application of Article I, § 7, violated the Free Exercise Clause. Missouri's decision was neither neutral as to religion nor based on any generally applicable principle. It was, by Missouri's own admission, discrimination against a religious organization.[2] As a result, Missouri's decision may stand only

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[2] In its opposition to Trinity Lutheran's Petition for a Writ of Certiorari, Missouri admitted it denied the church's grant application because awarding the grant to a religious organization would mean "turning down non-church applicants." Br. in Opp. 3. This assertion is plainly false, as Trinity Lutheran's application undisputedly was superior to all but four of the grant applications. If Missouri had rejected the application of

(Continued on following page)

if it survives strict scrutiny. *Lukumi*, 508 U.S. at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.").

Strict scrutiny means that Missouri's actions violated the Free Exercise Clause unless they furthered a compelling state interest. *Id.* at 532-33. But Missouri had no legitimate interest in preventing a religiously-affiliated school from improving the safety of its playground. And Missouri's claimed overarching interest—maintaining a separation between church and state that is more stringent than that required by the United States Constitution—is not advanced by denying funds to a religious organization when those funds would have been used for an entirely secular purpose.

Missouri defends its behavior by citing this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004). But *Locke* involved scholarships to train future ministers in "devotional theology," and this Court concluded that the Free Exercise Clause does

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some non-church applicant, it would not have done so because of the applicant's non-religious status, but because its application was ranked lower based on other objective criteria.

In any event, Missouri admits it favored non-church applicants at the expense of religious organizations. It admitted it wants no limits on "the government's ability to decide what message of endorsement it wants to send." *Id.* at 4. Apparently, Missouri's message to its citizens is that it endorses playground safety for non-religious children but not for religious children.

not compel a state to fund religious vocational training. *Locke* does not sanction, and should not be extended to allow, the discriminatory denial of generally available secular public benefits to religious organizations.

ARGUMENT

I. MISSOURI'S REFUSAL TO ALLOW TRINITY LUTHERAN TO PARTICIPATE IN A PLAYGROUND SAFETY PROGRAM DISCRIMINATED AGAINST RELIGION

The Free Exercise Clause of the First Amendment, which is applicable to the states through the Fourteenth Amendment, provides that neither Congress, nor any state, may make any law "prohibiting the free exercise" of religion. U.S. Const. amend. I.

The Free Exercise Clause does not just bar laws that prohibit religion. It also bars laws that discriminate on the basis of religion. As this Court has said, no state may, without violating the Free Exercise Clause, "target[] religious conduct for distinctive treatment" or single out "religious practice" for "discriminatory treatment." *Lukumi*, 508 U.S. at 534, 538.

> At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.

Id. at 532; *see also id.* at 560 (Souter, J., concurring) ("That the Free Exercise Clause contains a 'requirement for governmental neutrality' is hardly a novel proposition." (internal citation omitted)).

One way in which a state impermissibly discriminates against religion is by denying religious organizations the opportunity to participate in state-run programs. No state may discriminate "in the distribution of public benefits based upon religious status or sincerity." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

Discrimination in the provision of government benefits impedes the free exercise of religion because it tends to pressure religious adherents to abandon their convictions. As this Court explained in *Sherbert v. Verner*, 374 U.S. 398 (1963), withholding government benefits based on religious beliefs or conduct inevitably imposes undue burdens on religious observance. Denying government benefits based on religion "forces [an individual] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404. Thus, the "imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her * * * worship." *Ibid.* *See also ibid.* ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

This Court has repeatedly emphasized that, once a state decides to fund a benefits program, it may not dole out those benefits in a way that discriminates against religious organizations or religious adherents.

For example, in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), this Court held that a school district could not decline to provide a sign-language interpreter to a deaf student simply because he attended a Roman Catholic parochial school. In reversing the lower court, this Court explained that the First Amendment does not disable religious institutions "from participating in publicly sponsored social welfare programs." *Id.* at 8 (citing *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988)). "For if the Establishment Clause did bar religious groups from receiving general government benefits, then 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" *Ibid.* (quoting *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981)).

Similarly, in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), this Court ruled that a state erred in denying vocational assistance to a blind student at a Christian college. The state had declined to provide the assistance because of a state constitutional provision forbidding "the use of public funds to assist an individual in the pursuit of a career or degree in theology." *Id.* at 483. But this Court concluded the denial was improper, because the state's assistance program "works no state support of religion prohibited by the Establishment Clause." *Id.*

at 489. *See also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995) (state-run university must "ration or allocate" activity funds to student groups based "on some acceptable neutral principle" without discriminating against religious viewpoints).

This Court has also concluded, in three separate unemployment cases, that a state may not condition eligibility for unemployment benefits upon an individual's willingness to forego some aspect of his religious observance. *Sherbert*, 374 U.S. 398; *Thomas v. Review Bd., Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemp't Appeals Comm'n of Fla.*, 480 U.S. 136 (1987).

Moreover, this Court has repeatedly approved state programs that provide equal benefits to religious and non-religious organizations. Thus, in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), this Court upheld a state-funded scholarship program that provided tuition aid and tutorial assistance to students attending public schools, secular private schools, and religious private schools. The Court observed:

> [The] program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district.

Id. at 662.

Similarly, in *Mitchell*, this Court upheld a program providing educational supplies and equipment to secondary schools, including sectarian and parochial schools. In so doing, the Court said it has "consistently turned to the neutrality principle, upholding aid that is offered to a broad range of groups or persons without regard to their religion." 530 U.S. at 794. The Court concluded: "the religious nature of a recipient *should not matter* to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose." *Id.* at 827 (emphasis added). *See also Mueller v. Allen*, 463 U.S. 388, 395 (1983) (upholding tax deduction for tuition payments made to private religious schools because "assist[ing] parents in meeting the rising cost of educational expenses plainly serves" a "secular purpose").

Missouri's application of Article I, § 7, here runs afoul of the neutrality principle set out in these cases. Neutrality is the rule, and state-provided benefits must be distributed based on neutral principles and not offered—*or withheld*—because of religion.

Missouri rejected Trinity Lutheran's application to participate in the playground improvement program simply because it is a religious organization. In so doing, the state put to Trinity Lutheran a stark choice—abandon its religious affiliation in order to qualify for the state's grant program, or adhere to its religious convictions but forego improving the safety of its playground. That violated the Free Exercise Clause.

II. MISSOURI DID NOT APPLY ARTICLE I, § 7, IN A NEUTRAL OR GENERALLY APPLICABLE MANNER

If Missouri had implemented its playground safety grant program in a neutral way, and allocated safety grants using rules that were generally applicable to all applicants, then it would have had substantial leeway to act without offending the Free Exercise Clause. The Free Exercise Clause does not prevent a state from enacting a "neutral law of general applicability" even if that law has a disparate impact on religious organizations. *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990).

Missouri did not apply Article I, § 7, in a neutral or generally applicable manner, however. Missouri used Article I, § 7, to single out a school for disfavor *simply because it is a religious organization*.

This application of Article I, § 7, fails the *Smith* test. A law is not "neutral" if it targets "a religious practice without a secular meaning discernible from the language or context." *Lukumi*, 508 U.S. at 533. And a law is not "generally applicable" if "the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 543. *See Cent. Rabbinical Congress of the U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 186 (2d Cir. 2014) (health regulation requires strict scrutiny because, although facially neutral, it "purposefully and exclusively targets a religious practice for special burdens").

Missouri argues that state funding falls outside *Smith*'s "neutrality" principle. Br. in Opp. 7-8. Missouri claims that "neutral funding [has] not carried the day at the Supreme Court." *Ibid.* (citing *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 779 (7th Cir. 2010)). Thus, according to Missouri, "the State [may] choos[e] where to spend limited funds over which it 'retains plenary control.'" *Id.* at 8 (citing *Badger Catholic*, 620 F.3d at 780).

Missouri's argument misunderstands the breadth and scope of this Court's neutrality principle. *Lukumi*, for example, expressly forbids discrimination against religion, and nothing in that decision carves out an exception for state funding of secular benefits. Quite the contrary: *Lukumi* says that "a law targeting religious beliefs as such is *never* permissible," and it forbids "even subtle departures from neutrality." 508 U.S. at 533-34 (emphasis added).

Sherbert v. Verner, *Zobrest v. Catalina*, and many other cases involving state funding similarly forbid the withholding of generally available secular benefits on the basis of religion. *Sherbert*, 374 U.S. 398; *Zobrest*, 509 U.S. 1; *see also Thomas*, 450 U.S. 707; *Hobbie*, 480 U.S. 136 (1987). As this Court concluded in *Mitchell*, no state may discriminate "in the distribution of public benefits based upon religious status or sincerity." 530 U.S. at 828.

Certainly a state has control over its budget, and may make many permissible choices among its funding priorities. But that does not mean a state can

make *any* choice. Its funding decisions must still comply with the Free Exercise Clause. This Court's decisions do not admit any "state funding" exception to the neutrality rule. Laws which are not applied in a neutral and generally applicable manner must survive strict scrutiny under the Free Exercise Clause. Article I, § 7, was not applied in a neutral and generally applicable manner in this case. If it is to survive, therefore, it must overcome strict scrutiny's high hurdle.

III. MISSOURI'S APPLICATION OF ARTICLE I, § 7, CANNOT SURVIVE STRICT SCRUTINY

"A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546. It must, among other things, "advance 'interests of the highest order'" and "will survive strict scrutiny only in rare cases." *Ibid.*

Strict scrutiny requires Missouri to articulate a compelling state interest and implement that interest using the least restrictive means. *Id.* at 532-33. Missouri's application of Article I, § 7, in this instance did not further any compelling state interest.

The Eighth Circuit described Missouri's government interest as a desire to maintain a "high wall of separation between church and state." Pet. App. 12a.

But this Court has already identified the constitutional limitations on Missouri's interest in maintaining a separation between church and state that is more severe and restrictive than that required by the First Amendment. In *Widmar v. Vincent*, this Court held that Missouri's claimed interest in "achieving greater separation of church and State than is already ensured under the Establishment Clause" was "limited by the Free Exercise Clause." 454 U.S. at 276.

For that reason, this Court struck down a University of Missouri policy that denied religious student groups the same access to university facilities as was provided to other student groups. The Court reasoned that, having decided to open school facilities to student groups generally, "the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Id.* at 267. Missouri's interest in maintaining a high degree of separation between church and state was not enough to justify excluding religiously oriented student groups from campus facilities when other student groups were allowed to use those facilities. *Ibid. See also Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993) (school district improperly discriminated against religious groups when it allowed the use of school property for specified public purposes but denied access to religious groups); *Rosenberger*, 515 U.S. at 834 (university improperly discriminated against student-run religious publication by withholding funding; a university "may not

discriminate based on the viewpoint of private persons whose speech it facilitates"); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) (school improperly discriminated against religious organization by denying after-school access; state "must not discriminate against speech on the basis of viewpoint").

Widmar v. Vincent teaches that Missouri's interest in erecting a higher wall between church and state has a limit. That limit is the Free Exercise Clause. Missouri may not allocate government resources to some groups but deny others on the basis of religion without violating the Free Exercise Clause.

If that is true for religious student groups and activities, it must be even more true for school playgrounds. After all, in *Widmar*, this Court assumed that the university's facilities would be used "to engage in religious worship and discussion." 454 U.S. at 269. Here, by contrast, Trinity Lutheran's playground will not advance religion, or promote religious speech, worship, or discussion, in any conceivable sense. No wall between church and state, no matter how high, will be breached by enhancing the safety of Trinity Lutheran's playground. And Missouri has not offered any reason why its interest in maintaining an extra-high wall between church and state would be disserved if children playing at a church playground were as safe as children playing elsewhere.

It is not enough for Missouri to say it has a "compelling interest" in maintaining a separation

between church and state. It is not even enough for Missouri to say it wishes to maintain a separation that is greater than that required by the First Amendment. To survive scrutiny under the Free Exercise Clause, Missouri's application of Article I, § 7, must not unfairly discriminate against religious organizations. It must maintain a policy of equal access and implement that policy with strict neutrality. *Id.* at 267.[3]

Because Missouri did not offer its playground safety grants in a neutral and generally applicable

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[3] Missouri incorrectly argues that its discriminatory treatment of religious organizations does not violate the First Amendment because it is not motivated by anti-religion animus. But this Court has never held that animus is an essential prerequisite to a Free Exercise Clause violation. "The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted." *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring); *see also id.* at 569-70 (Souter, J., concurring) ("[T]he Court repeatedly has stated that the [Free Exercise] Clause sets strict limits on the government's power to burden religious exercise, whether it is a law's object to do so or its unanticipated effect."); *id.* at 577 (Blackmun, J., concurring) ("[T]he First Amendment's protection of religion extends beyond those rare occasions on which the government explicitly targets religion (or a particular religion) for disfavored treatment."). *See also Cent. Rabbinical Congress*, 763 F.3d at 197-98 ("[C]lose scrutiny of laws singling out a religious practice for special burdens is not limited to the context where such laws stem from animus."); *Shrum v. City of Coweta*, 449 F.3d 1132, 1144 (10th Cir. 2006) (the "Free Exercise Clause is not limited to acts motivated by overt religious hostility" but also protects "the free exercise of religion from unwarranted governmental inhibition whatever its source").

way, and because its discrimination against a religious organization did not further any compelling state interest, its application of Article I, § 7, in this instance violated the Free Exercise Clause.

IV. *LOCKE V. DAVEY* DOES NOT EXCUSE MISSOURI'S DISCRIMINATION AGAINST TRINITY LUTHERAN'S SECULAR ACTIVITIES

Missouri defends its decision by citing this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004). The Eighth Circuit sided with Missouri on the same grounds. Pet. App. 10a.

The Eighth Circuit erred in thinking that Trinity Lutheran asserted a facial challenge to Article I, § 7.[4] It compounded that error by misreading *Locke*'s scope and logic.

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[4] The Eighth Circuit held that Trinity Lutheran's complaint was a "plainly facial attack" on Article I, § 7. Pet. App. 6a-7a. That was error. Trinity Lutheran never challenged Missouri's right to refuse to make an appropriation to a church, denomination, priest, or minister. Trinity Lutheran instead challenges the way Missouri applied Article I, § 7 *in this case*—which involves a public grant program created for the entirely secular purpose of improving playground safety.

Judge Gruender, writing in dissent, correctly concluded that Trinity Lutheran "does not mount the expansive facial challenge that the court attributes to it. Trinity Lutheran tries to bring an as-applied challenge; the complaint says so numerous times." Pet. App. 24a. "Trinity Lutheran does not contend that Article I, § 7 of the Missouri Constitution is unconstitutional in all of its applications." Pet. App. 24a-25a.

In *Locke*, this Court held that Washington State could properly decline to offer taxpayer-funded scholarships to students training full-time for the ministry while offering scholarships to students pursuing other majors. *Locke*, 540 U.S. at 722 n.5. The Court held that this did not offend the Free Exercise Clause's non-discrimination principle because the state had "merely chosen not to fund a distinct category of instruction" intended to "prepare students for the ministry." *Id.* at 719, 721. The Court also acknowledged the State's long-standing interest in not providing public funding to the clergy. *Id.* at 722-23.

Locke's facts are completely different from the facts here. It is one thing for a state to decline to fund vocational religious training; it is quite another for the state to exclude churches from participating in a public safety program offered to every other qualifying organization in the state.

Two features of the *Locke* decision plainly show why it does not supply the rule of decision in this case.

A. *Locke* Distinguished Between Educating Clergy And Funding Secular Education; No Distinction Can Be Made Between Sectarian And Secular Playground Safety

Locke turned on the distinction between secular education and religious training for the ministry. The *Locke* Court drew a bright line between "training for

secular professions" and "training for religious professions." *Id.* at 721. The Court found that "devotional theology" is "a distinct category of instruction." *Ibid.* Training for the ministry, it concluded, is "an essentially religious endeavor" "akin to a religious calling," and is qualitatively different than "an academic pursuit." *Ibid.* Funding religious vocational training would be the equivalent of using "taxpayer funds to support church leaders." *Id.* at 722.

The Court took great pains to emphasize that Washington State's scholarship program did *not* discriminate against religious instruction or against religious institutions generally. The Court noted approvingly that the program "permits students to attend pervasively religious schools, so long as they are accredited," and also allows students to take courses in religion. *Id.* at 724. The only exclusion was for "vocational religious instruction." *Id.* at 725.[5]

Locke thus stands for the limited proposition that a state may distinguish between secular education and vocational training for the clergy.

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[5] For this reason, the majority rejected a criticism leveled by Justice Scalia. Justice Scalia argued, in dissent, that the state discriminated against religion when it denied a "generally available" public benefit "solely on the basis of religion." *Id.* at 726-27 (Scalia, J., dissenting). The Court replied, not by rejecting the neutrality principle, but by holding it did not apply because the "generally available" scholarship was to train students for secular professions, and "training for religious professions and training for secular professions are not fungible." *Id.* at 721.

The Eighth Circuit ignored this clear focus on training for the ministry. It read *Locke* as broadly permitting a state to discriminate against religious organizations in the provision of secular public benefits. *Ibid.* *Locke* did nothing of the sort. The *Locke* Court expressly emphasized the limits of its ruling when it cautioned that "the only interest at issue here is the State's interest in not funding the religious training of clergy." *Id.* at 722 n.5.[6]

Missouri has no comparable interest in not funding playground safety improvements for church-sponsored schools. There is no perceptible difference between the playgrounds of secular and sectarian schools. There is no difference in the need for improved playground safety between religious and non-religious organizations. And there is no neutral basis upon which Missouri might draw a line between religious and non-religious school grant recipients.

Missouri created a public program for the secular purpose of improving playground safety. Missouri denied Trinity Lutheran's application to participate in the program solely because it is a religious organization. Religion was the basis—the only basis—for denying Trinity Lutheran's application. That violated the Free Exercise Clause.

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[6] *See* Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty*, 118 Harv. L. Rev. 155, 184 (2004) ("There is much to suggest, beginning with the Court's discussion of tradition and its collection of early state constitutions, that the opinion is confined to the training of clergy.").

B. *Locke* Relied On A Substantial "Antiestablishment" State Interest In Not Supporting "Church Leaders"

The other important basis for this Court's decision in *Locke* was the state's "historic and substantial" "interest in not funding the religious training of clergy." 540 U.S. at 722 n.5, 725. The Court observed that, "[s]ince the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders." *Id.* at 722. For this reason, many states "placed in their constitutions formal prohibitions against using tax funds to support the ministry." *Id.* at 723. Focusing on this historic interest, the Court concluded that "the denial of funding for vocational religious instruction alone is [not] inherently constitutionally suspect." *Id.* at 725.

There is no corresponding historic or substantial state interest in preventing church-sponsored schools from making their playgrounds safer. The concerns cited in *Locke* focused precisely, and specifically, on the support of church leaders. *E.g.*, *id.* at 715 ("pursuing a degree in devotional theology"); *id.* at 716 ("pursuing a degree in theology"); *ibid.* ("devotional in nature or designed to induce religious faith"); *id.* at 721 ("akin to a religious calling"); *id.* at 722 n.5 ("State's interest in not funding the religious training of clergy"); *id.* at 725 ("denial of funding for vocational religious instruction").

There is no basis for extending *Locke*, from its origins as a rule against state funding for church

leaders, to permit the denial of public funding for a secular safety program benefiting school playgrounds. Indeed, this Court has held that "the Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation." *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 242 (1968). The First Amendment permits a state to use taxpayer funds to provide bus fares for religious students, *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947), and to loan non-religious textbooks to religious schools, *Allen*, 392 U.S. at 242.

Whatever Establishment Clause concerns may have motivated Missouri's adoption of Article I, § 7, they could not have been the motivation for Missouri's decision, in this case, to deny a playground safety grant to a religious organization.

CONCLUSION

"The Free Exercise Clause commits government itself to religious tolerance." *Lukumi*, 508 U.S. at 547. Missouri fell short of that constitutional obligation in this instance.

Missouri created a public benefit program for a secular purpose—improving playground safety. Having created the program, it could not then limit participation in the program based on religion. Missouri denied Trinity Lutheran's application solely because it is a religious organization. By singling out

Trinity Lutheran for disfavored treatment, Missouri violated the Free Exercise Clause.

Respectfully submitted,

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RECORD AND BRIEFS

No. 15-577

In The
Supreme Court of the United States

TRINITY LUTHERAN CHURCH
OF COLUMBIA, INC.,

Petitioner,

v.

SARA PARKER PAULEY,
IN HER OFFICIAL CAPACITY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Institute for Justice files this brief on its own behalf as amicus curiae. The Institute is a public interest law firm based in Arlington, Virginia; it is a non-partisan, non-profit organization that represents its clients pro bono. The Institute litigates cases in four areas: private property rights, economic liberty, freedom of speech, and school choice.

As part of its school-choice practice, the Institute often represents, as intervenor-defendants, parents who wish to use scholarships and other forms of aid made available through school-choice programs when those programs are challenged in court. The Institute has twice represented such parents before this Court, in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011). The Institute, moreover, currently represents the parents petitioning for certiorari in *Doyle v. Taxpayers for Public Education*, No. 15-556 – a petition this Court appears to be holding pending resolution of the present case.

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[1] No counsel for any party authored this brief in whole or part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Institute for Justice made such a monetary contribution. Counsel for the petitioner provided blanket consent to the filing of amicus curiae briefs. Counsel for the respondent provided the Institute with written consent, which is on file with the Court.

The Institute has also defended school-choice programs on behalf of parents in some 22 other cases. In most of them, as in *Doyle*, the plaintiffs challenging the programs have argued that, because the programs include religious options, they violate state constitutional provisions similar to Article I, section 7, of the Missouri Constitution – the provision upon which Missouri relied to exclude Trinity Lutheran from its playground resurfacing program. In such cases, the Institute argues that applying these state "Blaine Amendments" to invalidate school-choice programs violates the federal Constitution. In five other cases, moreover, the Institute has brought federal constitutional challenges on behalf of parents when states have taken it upon themselves to exclude religious options.

Like Trinity Lutheran, the Institute does not believe that Blaine Amendments and other state constitutional provisions should be permitted to bar religion from public-benefit programs, and it therefore files this brief in support of Trinity Lutheran. But it also submits this brief to address an important *distinction* between the present case and those it litigates, including *Doyle*: the "consistent distinction" that this Court has drawn between (1) public-benefit programs that provide aid to *institutions*, such as the playground resurfacing program in this case, and (2) public-benefit programs that provide aid to *individuals*, such as the school-choice program in *Doyle*. *Zelman*, 536 U.S. at 649. This Court has been more protective of religion in the latter context, where "the

link between government funds and religious training is broken by the independent and private choice" of students and their parents. *Locke v. Davey*, 540 U.S. 712, 719 (2004).

Thus, regardless of whether this Court allows states to bar churches from the type of institutional-aid program at issue in this case, it should make clear, in this case or *Doyle*, that states may not bar religious options from *individual*-aid programs. Denying a child the option of a religious school when her parents believe that is the best option for her does not merely deprive the child of educational opportunity – it violates the federal Constitution.

SUMMARY OF THE ARGUMENT

The question presented in this case – whether a church may be excluded from an otherwise generally available playground resurfacing program – is one with far-reaching implications. The Court's answer to the question could bear on the federal constitutional rights of the 1.3 million students currently participating in school-choice programs throughout the country.

School-choice programs, which provide aid to families in order to empower them to choose the schools that are best for their children, are commonly challenged by those who argue that such programs must exclude religious options. Of course, since *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), it has been clear that the federal Constitution *allows*

religious options in these programs. Nevertheless, school-choice opponents maintain that *state* constitutional provisions, including "Blaine Amendments" like the one at issue in this case, prohibit religious options and that, under the federal Constitution, states are perfectly free to prohibit them.

Thus, the relevance of this case to school choice: if this Court holds that religious-based exclusions in public-benefit programs violate the federal Constitution, it will put the argument of school-choice opponents to rest, and school-choice families will be able to continue accessing the educational options, religious or not, that are best for their children. And that should be the holding in this case, for the Religion Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment, demand neutrality – not hostility – toward religion.

If, however, this Court upholds the religion-based exclusion in this case, then it should rule narrowly, addressing only the playground resurfacing program at issue or, at most, public-benefit programs that provide aid to *institutions*. It should, moreover, make clear that states may *not* exclude religious options from public-benefit programs that, like school-choice programs, provide aid to *individuals*, *i.e.*, students. It should do so for four reasons.

First, this Court's Religion Clause jurisprudence has drawn a "consistent distinction" between programs that provide aid to institutions and those that provide aid to individuals, who in turn decide where

to use that aid. *Id.* at 649. It has been more protective of religion in the individual-aid context, where "the link between government funds and religious training is broken by the independent and private choice of recipients." *Locke v. Davey*, 540 U.S. 712, 719 (2004).

Second, the "Blaine Amendments" and other state constitutional provisions upon which school-choice opponents rely in attempting to expel religious options were not designed to reach programs that provide aid to individual students. Rather, they were concerned with public funding of certain religious institutions.

Third, in the case of Blaine Amendments specifically, there is a history and object of anti-religious animus that should not be used to deny parental choice in education today. These provisions were "born of bigotry" and "pervasive hostility to the Catholic Church," *Mitchell v. Helms*, 530 U.S. 793, 828, 829 (2000) (plurality), and this Court should not allow engines of animus toward Catholics to be transmogrified into engines of animus against all religion.

Finally, this Court's opinion in *Locke v. Davey* does not, as some courts hold, sanction the exclusion of religious options from school-choice programs. As the Tenth Circuit has correctly noted, *Locke* simply does not authorize "the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008).

Accordingly, if this Court upholds the exclusion of churches from Missouri's playground resurfacing program, it should make clear in its opinion that such exclusions will not be tolerated in the individual-aid context. Alternatively, the Court should reserve judgment on the individual-aid question and grant certiorari in *Doyle v. Taxpayers for Public Education*, No. 15-556, which squarely presents that question, to resolve it.

ARGUMENT

I. Barring Religion From Public-Benefit Programs Has Implications Far Beyond Scrap Tires For Church Playgrounds, And This Court Should Not Allow It

Whether religion-based exclusions in public-benefit programs are constitutional is a question whose answer has implications far beyond scrap tires and church playgrounds. Its answer is perhaps most pressing for the more than one million kindergarten-through-twelfth-grade students currently participating in school-choice programs that empower parents to choose the schools that are best for their children.

As of the submission of this brief, approximately 1.3 million students at the K-12 level were participating in such programs. They include approximately 167,950 students in publicly-funded scholarship, or "voucher," programs; 226,000 students in tax-credit-generated scholarship programs; 6,850 students in

publicly-funded education savings account programs; and 911,610 students whose parents receive individual tax credits or deductions to help offset the cost of private schooling. *Fast Facts*, EdChoice.org, http://www.edchoice.org/our-resources/fast-facts/ (last visited April 16, 2016).

These programs, moreover, are on the books in every corner of the country. There are now publicly-funded scholarship programs in fifteen states[2] and the District of Columbia; tax-credit-generated scholarship programs in seventeen states;[3] education savings account programs in five states;[4] and individual tax credit/deduction programs in eight states.[5] *Id.* All told, there are now 61 school-choice programs in thirty states and the nation's capital.[6]

When such programs are adopted, they are frequently challenged by those who insist religious options must be excluded from public-benefit programs. School-choice families, in turn, are subjected to years

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[2] Arkansas, Colorado, Florida, Georgia, Indiana, Louisiana, Maine, Maryland, Mississippi, North Carolina, Ohio, Oklahoma, Utah, Vermont, and Wisconsin.

[3] Alabama, Arizona, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Montana, New Hampshire, Nevada, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Virginia.

[4] Arizona, Florida, Mississippi, Nevada, and Tennessee.

[5] Alabama, Illinois, Indiana, Iowa, Louisiana, Minnesota, South Carolina, and Wisconsin.

[6] Some states have multiple types of programs.

of uncertainty, knowing that, at any moment, a court might halt the program in which they are participating, forcing them to foot a bill they cannot afford or return their children to public schools that were not meeting their needs in the first place.

Since *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), those who bring these lawsuits have no federal leg on which to stand. *Zelman* held that the Establishment Clause *allows* religious schools to participate in school-choice programs, so long as the programs are neutral with respect to religion – meaning religious and non-religious schools alike are free to participate – and so long as parents, rather than government, select the schools their children attend. *Id.* at 653, 662-63.

Undeterred, school-choice opponents have continued to rely on *state* constitutions – especially, but not exclusively, on the "Blaine Amendments" found in many state constitutions. They argue that even though the Establishment Clause allows religious options, states are still free to bar them. Sadly, some courts have agreed, concluding that it is perfectly permissible under the federal Constitution to single out and exclude religious options from otherwise generally available school-choice programs.

One such case is *Doyle v. Taxpayers for Public Education*, No. 15-556, which is currently pending in this Court on a petition for writ of certiorari. *See Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 473-75 (Colo. 2015) (plurality)

(invalidating scholarship program because it included religious options and concluding that doing so did not violate federal Constitution). Sadly, it is not the only one. *See Eulitt ex rel. Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344, 356-57 (1st Cir. 2004) (holding exclusion of religious options from scholarship program did not violate federal Constitution); *Anderson v. Town of Durham*, 895 A.2d 944, 959-61 (Me. 2006) (same); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 563-64 (Vt. 1999) (same).

Thus, the question presented in this case – whether the federal Constitution tolerates a state's exclusion of churches from an otherwise generally available public-benefit program – takes on particular significance for the rapidly growing number of school-choice families. The Court's resolution of that question could affect the freedom of these families to choose a religious school if they believe it to be the best educational option for their child. It could also affect the ability of lawmakers to use school-choice programs as a policy tool to provide parents with the widest array of educational options.

If this Court concludes that religion-based exclusions in public-benefit programs are inconsistent with the federal Constitution, then the families participating in school-choice programs will be able to rest securely, knowing they will continue to have access to the schools that best serve their children. And that *should* be the resolution of this case.

This Court, after all, held, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), that government may not single out religion for unfavorable treatment unless it has a "compelling governmental interest" for doing so and acts in a way that is "narrowly tailored to advance that interest." *Id.* at 531-32. Missouri has no such interest. Allowing churches to participate in the playground resurfacing program is plainly permissible under the Establishment Clause, *see Mitchell v. Helms*, 530 U.S. 793 (2000), and Missouri therefore cannot claim a compelling interest in avoiding an Establishment Clause violation.

A "state interest . . . in achieving *greater* separation of church and State than is already ensured under the Establishment Clause," moreover, is not a compelling governmental interest. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). In fact, in *Widmar*, Missouri relied on the very Blaine Amendment it relies on here to try to justify excluding religious organizations from using otherwise-available state university facilities for religious worship. *Id.* at 275 & n.17. This Court held the exclusion unconstitutional under the Free Speech Clause, explaining that "[i]n this constitutional context, we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech." *Id.* Similarly, in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court concluded that a state university did not have a compelling governmental interest in

excluding a religious organization from using otherwise available student-activity funds for religious activities. *Id.* at 845-46.

Finally, this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), does not give Missouri the constitutional license the state claims it does. As *Locke* stressed, "the only [governmental] interest at issue" in that case was "the State's interest in not funding the religious training of clergy," *id.* at 722 n.5 – an interest not at issue in a program concerning playground resurfacing. Moreover, the public-benefit program at issue in *Locke* went "a long way toward *including* religion in its benefits." *Id.* at 724 (emphasis added). Missouri, on the other hand, has effected a wholesale exclusion of religion, and *Locke* simply does not authorize "the wholesale exclusion of religious institutions . . . from otherwise neutral and generally available government support." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008).

II. If, However, This Court Concludes That Churches May Be Barred From The Playground Resurfacing Program, Then It Should Clarify – In This Case Or *Doyle* – That Religious Options May Not Be Barred From School-Choice Programs

If, however, this Court *allows* the religion-based exclusion in this case, then the Court's opinion – depending on its breadth – could severely hamstring the nation's many thriving school-choice programs and the opportunities they provide. Accordingly, if this

Court upholds the exclusion, it should rule narrowly, addressing only the playground resurfacing grant program at issue or, at most, public-benefit programs that provide aid to *institutions*. It should, moreover, make clear – in this case or in *Doyle*, where the issue is squarely presented – that states may *not* exclude religious options from public-benefit programs that, like school-choice programs, provide aid to *individuals*, *i.e.*, students.

The Court should take this course for four reasons. First, this Court's Establishment Clause jurisprudence has drawn a "consistent distinction" between programs that provide aid to institutions and those that provide aid to individuals, who in turn decide where to use that aid, *Zelman*, 536 U.S. at 649, and it has been more protective of religion in the latter context, where "the link between government funds and religious training is broken by the independent and private choice of recipients," *Locke*, 540 U.S. at 719. Second, the "Blaine Amendments" and other state constitutional provisions upon which opponents of school-choice programs rely in attempting to expel religious options from the programs were not designed to reach aid to individual students; they were designed to reach public funding of certain religious institutions. Third, in the case of Blaine Amendments specifically, there is a history and object of anti-religious animus that this Court should not allow to be used to deny parental choice in education. And fourth, this Court's decision in *Locke* does not authorize the wholesale exclusion of religious options

from school-choice programs, as some courts have concluded it does.

A. This Court Has Drawn A "Consistent Distinction" Between Public-Benefit Programs That Aid Institutions And Those That Aid Individuals

This Court has drawn what it has called a "consistent distinction" between institutional- and individual-aid programs – *i.e.*, "between [1] government programs that provide aid directly to religious schools and [2] programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649 (citations omitted). Although the Court has drawn this distinction in cases concerning the permissibility of *including* religious options in school-choice and similar individual-aid programs, it bears on the permissibility of *excluding* religious options from such programs, as well.

1. The Court Has Consistently Held That Individual-Aid Programs Can Include Religious Options So Long As They Are Neutral And Operate On Private Choice

In *Zelman*, this Court noted that although its "jurisprudence with respect to the constitutionality of direct [institutional] aid programs has 'changed

significantly' over the past two decades," its "jurisprudence with respect to true private choice programs has remained consistent and unbroken." *Id.* (quoting *Agostini v. Felton*, 521 U.S. 203, 236 (1997)). This jurisprudence, which began to develop in *Mueller v. Allen*, 463 U.S. 388 (1983), and culminated in *Zelman* itself, makes clear that, so long as a public-benefit program is neutral toward religion – meaning religious *and* non-religious schools or institutions are free to participate – the private choice of "*individuals*, who, in turn, direct the aid to religious schools or institutions of their own choosing," breaks any connection between church and state. *Zelman*, 536 U.S. at 649 (emphasis added).

In *Mueller*, for example, the Court upheld, under the Establishment Clause, a program that provided tax deductions for educational expenses, including tuition at private religious or non-religious schools. *Mueller*, 463 U.S. at 390-91. It was of no moment that 96 percent of the program's beneficiaries were parents of children attending religious schools, because the program "neutrally provide[d] state assistance to a broad spectrum of citizens," and any "financial benefits flowing to [such] schools" did so "only as a result of numerous, private choices of individual parents of school-age children." *Id.* at 398-99. "Where . . . aid to [religious] schools is available only as a result of decisions of individual parents," the Court concluded, "no 'imprimatur of State approval' can be deemed to have been conferred on any particular religion, or on

religion generally." *Id.* at 399 (citation omitted) (quoting *Widmar*, 454 U.S. at 274).

The Court reiterated this principle several times in subsequent cases. In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), for example, it held that the Establishment Clause did not bar religious colleges and universities from participating in a state-funded scholarship program, because the aid was "neutrally available" and "[a]ny aid . . . that ultimately flow[ed] to religious institutions d[id] so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 488, 489. Similarly, in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), it rejected an Establishment Clause challenge to the provision of federally-funded special education services to children in private schools, religious and non-religious, because the program "distribute[d] benefits neutrally to any child qualifying as 'disabled'" and "accord[ed] parents freedom to select a school of their choice." *Id.* at 10.

The *Mueller/Witters/Zobrest* approach culminated in *Zelman*, which concerned a scholarship program for elementary and secondary students substantially identical to that at issue in *Doyle*. The Court began its analysis by reviewing its earlier individual-aid cases and summarizing their common thread – neutrality and private choice:

> *Mueller, Witters*, and *Zobrest* . . . make clear that where a government aid program is

> neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.

Zelman, 536 U.S. at 652. Because the scholarship program before it shared these characteristics, the Court upheld the program, notwithstanding that 96 percent of participating students had chosen to attend religious schools. *Id.* at 647, 663.

In addition to explaining *that* neutrality and private choice in individual-aid programs are dispositive for Establishment Clause purposes, the Court explained *why* they are dispositive and, therefore, why individual-aid programs with these characteristics are permissible even when certain forms of aid to religious *institutions* might not be. When "[a] program . . . shares these features," the Court noted, any "incidental advancement of a religious mission, or . . . perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government." *Id.* at 652. The Court later made the same point in simpler terms: "Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients." *Locke*, 540 U.S. at 719.

2. The Distinction Between Institutional-Aid And Individual-Aid Programs Matters Not Only To The Constitutionality Of *Including* Religious Options In School-Choice Programs, But Also To The Constitutionality Of *Barring* Religious Options From Them

The distinction between institutional- and individual-aid programs matters not only for purposes of determining whether religious options may be *included* in school-choice programs, but also in determining whether they may be *excluded*. If, after all, "the link between government funds and religio[n] . . . is broken" by private, individual choice, *id.*, then it is broken not only with respect to any Establishment Clause concerns in including religious options, but also with respect to any state anti-establishment interest in excluding them. And while school-choice opponents may insist that states have an interest in achieving *greater* separation than the Establishment Clause requires, the break in the link achieved by "genuine and independent private choice" is the *ultimate* separation. *Zelman*, 536 U.S. at 652. There is no greater separation in a chain than a break in its link.

Moreover, if, as this Court has held, neutrality and private choice are the necessary criteria for a permissible individual-aid program under the Establishment Clause, then the *absence* of those criteria – *i.e.*, a *lack* of neutrality, or a *denial* of private choice – is necessarily fatal under the Establishment Clause.

The neutrality and private choice requirements, after all, are relevant because of the Establishment Clause's mandate that a law not have "the forbidden 'effect' of advancing *or inhibiting* religion." *Id.* at 649 (emphasis added). If government's neutrality toward religion and provision for private, individual choice are necessary to protect against governmental *advancement* of religion, then government's banishment of religion, or its denial of private, individual choice, will necessarily "*inhibit[]* religion." *Id.* (emphasis added).

For evidence, one need only consider what happened in Maine when it excluded religious options from the school-choice program at issue in *Eulitt* and *Anderson*. Religious options had been permitted in the program for more than a century, but in 1980, they were barred. *Anderson*, 895 A.2d at 948. John Bapst High School – a Catholic school that had "enrolled the largest number of [participating] students attending a religious-affiliated high school" – was forced to close and re-open as a secular school, stripped of its Catholic identity, rather than see students who could not afford tuition denied the opportunity of an outstanding education. John Maddaus & Denise A. Mirochnik, *Town Tuitioning in Maine: Parental Choice of Secondary Schools in Rural Communities*, 8 J. Res. Rural Educ. 27, 32 (1992). The state's banishment of religious options undoubtedly had "the forbidden 'effect' of . . . inhibiting religion." *Zelman*, 536 U.S. at 649.

Thus, so long as this Court maintains a distinction between institutional and individual aid, and so long as the Establishment Clause protects against governmental inhibitions of religion as it does governmental advancements, states cannot constitutionally exclude religious options from school-choice programs.

3. The Lower Courts That Have Allowed Exclusion Of Religious Options From School-Choice Programs Have Overlooked, Or Flatly Ignored, The Implications Of The Institutional/Individual-Aid Distinction

Sadly, however, the distinction this Court has drawn between institutional and individual aid, and its significance for the constitutionality of excluding religious options from school-choice programs, has been lost on – even ignored by – lower courts that have found such exclusions permissible. So long as this Court maintains the distinction, it should make clear that it is a distinction with a difference.

A number of lower courts have mistakenly viewed the institutional/individual-aid distinction as a one-way street in this Court's Establishment Clause jurisprudence – as bearing only on the inclusion, but not exclusion, of religious options in individual-aid programs. In *Chittenden Town School District*, for example, the Vermont Supreme Court held that applying Vermont's "compelled support" clause to bar religious options in a school-choice program did not offend the federal Constitution. In so holding, it

recognized that this Court has drawn a distinction between institutional and individual aid, 738 A.2d at 549, and that, under *Witters* and *Mueller*, "the focus . . . has been the question of who receives or controls the expenditure of the public money – private individuals or the sectarian school." *Id.* at 564 (Johnson, J., concurring). But the court only considered this distinction in observing that, under the Establishment Clause, a state may include religious options in school-choice programs without impermissibly advancing religion. *See id.* at 549 (acknowledging that, under "federal law[,] . . . tuition payments to sectarian schools are constitutional as long as the schools are selected by the parents of the attending children"). It failed to consider the distinction's relevance in deciding whether a state may *exclude* religious options from such programs without *inhibiting* religion. The First Circuit likewise failed to consider the distinction's relevance in upholding Maine's wholesale exclusion of religious options from its school-choice program. *See Eulitt*, 386 F.3d at 353-57.

Worse, in *Doyle*, the institutional/individual-aid distinction was dismissed as "irrelevant" to the determination of whether excluding religious options from a school-choice program violates the Establishment Clause. There a three-justice plurality of the Colorado Supreme Court, in an outcome-determinative opinion, recognized that *Zelman* had distinguished between institutional- and individual-aid programs and that, for the latter, neutrality and private choice are the Establishment Clause's touchstones for the inclusion

of religious options. *Taxpayers for Pub. Educ.*, 351 P.3d at 473. But in holding that Colorado's Blaine Amendment requires their *exclusion*, and that excluding them does not violate the Establishment Clause, it dismissed the institutional/individual-aid distinction as "irrelevant." *Id.* at 473-74.

So long as this Court maintains its "consistent distinction" between institutional and individual aid, *Zelman*, 536 U.S. at 649, it should not allow lower courts to dismiss the distinction's significance. Accordingly, even if the Court declines to adopt a per se rule against religion-based exclusions in public-benefit programs, it should make clear, in this case or *Doyle*, that the institutional/individual-aid distinction matters and that such exclusions *are* prohibited in school-choice programs.

B. The State Constitutional Provisions Relied Upon To Bar Religious Options From School-Choice Programs Do Not Speak To Individual Aid And, Thus, Do Not Support An Anti-Establishment Interest In Excluding Religious Options

The institutional/individual-aid distinction is relevant to the federal constitutionality of religious exclusions in school-choice programs for another reason: the state constitutional provisions relied upon to justify such exclusions – namely, "Blaine Amendments" and "compelled support" clauses – do not even speak to individual aid. Therefore, they cannot support a state's

claimed anti-establishment interest in requiring the exclusion of religious options from such programs.

The most common state constitutional provisions relied upon by those who argue for the banishment of religious options from school-choice programs are state "Blaine Amendments." These provisions, the sordid history of which is discussed in Section II.C, below, were designed to do two things, both of which concerned institutions, rather than individuals: (1) preserve the overtly religious, nondenominationally Protestant nature of nineteenth-century public schools, while (2) prohibiting public funding of so-called "sectarian," or Catholic, institutions, particularly schools. *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting).

The text of the Blaine Amendment at issue in *Doyle*, for example – Article IX, section 7 of the Colorado Constitution – evinces this institutional focus. It prohibits payment of public funds "in aid of any *church* or sectarian *society*" or "to help support or sustain any *school, academy, seminary, college, university* or other literary or scientific *institution*, controlled by any church or sectarian denomination." (Emphasis added). The italicized objects of the provision's proscription are, without exception, institutions – specifically, churches and the educational institutions run by them. By proscribing aid to such institutions, the provision was designed to (1) allow religious instruction in public schools, which were *not* "controlled by any church or sectarian denomination," and (2) prohibit public funding of schools that *were* "controlled by a[ ] church or sectarian denomination," the

overwhelming majority of which were Catholic. The provision does not speak about aid to *individuals*, and for good reason: school-choice programs were practically non-existent when Colorado's Blaine Amendment was adopted.

The institutional focus is clear, as well, in the Missouri Constitution, which is at issue in the present case. The text of its primary Blaine Amendment, Article IX, section 8, proscribes public funding of any "school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination" – the same educational institutions targeted by Colorado's Blaine Amendment. Similarly, Article I, section 7, proscribes public funding "in aid of any church, sect or denomination of religion" – again, institutions. Although it also proscribes one specific form of *individual* aid – appropriations "in aid of any priest, preacher, minister or teacher" of a "church, sect or denomination of religion" – that is hardly surprising, as those individuals comprise the leadership of the institutions that are the provision's primary focus. As this Court observed in *Locke*, many states "placed in their constitutions formal prohibitions against using tax funds to support the ministry," and "*only* the ministry," because "religious training of clergy" is "of a different ilk." *Locke*, 540 U.S. at 722 n.5, 723.

The other state constitutional provisions relied upon by school-choice opponents in attempting to banish religious options from school-choice programs are "compelled support" clauses. But like Blaine

Amendments, these provisions, too, focus on aid to religious institutions – not individuals. The text of Vermont's compelled support clause, for example, evinces this focus on religious institutions and their leadership: "[N]o person . . . can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience." Vt. Const. ch. I, art. 3.

Such provisions were concerned with two common colonial-era practices: compulsory attendance at government-established churches and compulsory "taxes (commonly called tithes) in support of the churches and their ministers." Richard D. Komer, *School Choice and State Constitutions' Religion Clauses*, 3 J. Sch. Choice 331, 335 (2009); *see also id.* at 335. Compelled support clauses were designed to end these practices, and "the[ir] language is quite obviously aimed at avoiding the mandatory church attendance and compelled financial support that characterized the establishment of a particular religion as the official religion of the state." *Id.* at 336. They have nothing to say about public-benefit programs that aid individuals.

This is not to say that Blaine Amendments and compelled support clauses have not been stretched by some state courts to reach public-benefit programs that provide aid to individuals; they have. *E.g.*, *Taxpayers for Pub. Educ.*, 351 P.3d at 475 (holding Colorado's Blaine Amendment prohibited use of scholarships at religious schools); *Chittenden Town Sch. Dist.*, 738 A.2d at 562 (holding Vermont's compelled support

clause prohibited use of scholarships at religious schools). But whether, as a matter of state constitutional interpretation, these provisions reach that far is a separate question from whether, as a matter of federal constitutional jurisprudence, they can support a state's claimed anti-establishment interest in excluding religious options. In answering the second, federal question, it is the object of the provisions, as revealed by their text and history, that matters.[7]

The text and history of Blaine Amendments and compelled support clauses simply do not support a state's claimed anti-establishment interest in banishing religious options from school-choice programs. Their object was to ban public aid to certain religious institutions – not individuals. Thus, even if this Court concludes that these provisions provide states a sufficiently weighty justification for barring churches or other religious institutions from public-benefit

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[7] For example, in *Locke*, this Court recognized that the Washington Supreme Court had "authoritatively interpreted" its constitution "as prohibiting . . . [public] funding [of] religious instruction that will prepare students for the ministry." *Locke*, 540 U.S. at 719. But in considering whether Washington's anti-establishment interest was, for federal constitutional purposes, sufficiently important to justify barring such aid, the Court looked to the "plain text" of Framing-era state constitutions, as well Framing-era history. *Id.* at 722, 723. Only then did it conclude that Washington had an "historic and substantial state interest" in "not funding the religious training of clergy." *Id.* at 722 n.5, 724; *see also Lukumi*, 508 U.S. at 533, 535 (consulting text and operation of law to discern its object); *id.* at 542 (plurality) (consulting history for same purpose).

programs that, like the program in this case, aid institutions themselves, it should make clear that they do not justify barring religious options from school-choice programs, which aid individuals.

C. Extending Blaine Amendments To Bar Religious Options From Programs That Aid Individuals Extends The Anti-Catholic Animus Attending Their Enactment

There is another reason this Court should not allow Blaine Amendments specifically to justify the banishment of religious options from school-choice and other individual-aid programs: unlike compelled support clauses, which have the benign object of preventing state establishments of religion, Blaine Amendments were "born of bigotry" and "pervasive hostility to the Catholic Church." *Mitchell*, 530 U.S. at 828, 829 (plurality); *see also Zelman*, 536 U.S. at 721 (Breyer, J., dissenting) (noting anti-Catholicism "played a significant role" in the Blaine movement).

Although the history of these provisions is not part of the record in this case, it is a substantial part of the record in *Doyle*, and it is a disturbing history. As noted above, their target was the Catholic Church and the institutions, particularly schools, it operated. In fact, in *Mitchell*, a four-justice plurality of this Court called for Blaine's legacy to be "buried now." *Mitchell*, 530 U.S. at 829 (plurality). Now is, indeed, the time.

But even if this Court does not bury the Blaine Amendments completely, it should do the next best thing: hold that these provisions, which were designed to bar public funding of Catholic schools, cannot justify the exclusion of religious options from programs that fund students. Extending their reach to such programs, after all, is to extend the animus attending their enactment – something this Court should not countenance.

1. The Federal Blaine History Is Steeped In Anti-Catholic Animus

The history behind the Blaine Amendments dates to the early nineteenth century, when "reformers" advocating for the establishment of public schools sought to ensure those schools would be "non-sectarian." Although, today, "non-sectarian" is understood as "non-religious," the term meant something much different then.

Public school advocates believed moral education was an integral part of schooling and "should be based upon the common elements of Christianity." R. Freeman Butts, *The American Tradition in Religion and Education* 117 (1950). The early public schools therefore incorporated prayer and Bible reading in their curriculum. Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 666-68 (1998). The schools were overtly religious and practiced a generic, non-denominational Protestantism.

Invariably, it was the King James, or Protestant, version of the Bible that was read and Protestant versions of prayers that were recited. *Id.*

Creation of the early public schools, however, coincided with the arrival of increasingly non-Protestant, especially Catholic, immigrants. Unsurprisingly, these new citizens objected to the compulsory education of their children in Protestant public schools, and many Catholic students were beaten or expelled for refusing to partake in Protestant exercises.

For example, in 1853, Bridget Donahoe was expelled from her public school in Ellsworth, Maine, because she refused to read from the King James Bible. *Donahoe v. Richards*, 38 Me. 379, 391, 398 (1854). Bridget filed a lawsuit challenging her expulsion, triggering an anti-Catholic backlash that led to the burning of Ellsworth's two Catholic churches. *See* Brian Doyle, *The Ellsworth Incident*, Boston College Magazine 50, 53, 55 (Summer 1991).

In 1854, Maine's high court upheld Bridget's expulsion in an opinion dripping with nativism. It spoke of the "[l]arge masses of foreign population . . . among us, weak in the midst of our strength," who must be "assimilate[ed] . . . through the medium of the public schools." *Donahoe*, 38 Me. at 413. Shortly thereafter, Father John Bapst – who had counseled Bridget against participating in the Protestant exercises and for whom the Maine high school discussed in section II.A.2, above, was later named – was attacked by a mob while hearing confessions and carried away

to Ellsworth's shipyard, where he was tarred and feathered. Doyle, *supra*, at 55.

The Bridget Donahoe incident was hardly anomalous. In 1859, a Massachusetts court dismissed the prosecution of a public school teacher who beat a Catholic student, Tom Wall, for not participating in the school's Protestant exercises. *Commonwealth v. Cooke*, 7 Am. L. Reg. 417 (Boston Police Ct. 1859). And a grand jury declined to indict a public school teacher in Shirley, Massachusetts, after he severely beat John and Mary Hehir for refusing to read from the King James Bible. When their mother complained to the teacher, he beat them again in her presence. Joan DelFattore, *The Fourth R* 49 (2004).

When Catholics' efforts to obtain better treatment in public schools failed, they began opposing tax levies to support the schools and, later, organizing their own schools and seeking a share of public funds. Viteritti, *supra*, at 669. This upset the Protestant majority, and a virulent anti-Catholicism erupted. It engendered the nativist Know-Nothing party, which gained prominence – and political dominance – in a number of states in the mid-nineteenth century. The Know Nothings and those inspired by them convinced electorates in several states to adopt laws or constitutional provisions barring public funding of so-called "sectarian" schools. *Id.*; Lloyd Jorgenson, *The State and the Non-Public School: 1825-1925* 100 (1987). "[T]he Protestant position . . . was that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other

Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic)." *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting) (internal quotation marks omitted) (quoting John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 301 (2001)).

This anti-Catholic bigotry metastasized after the Civil War. In the mid-1870s, Republicans – plagued with Grant administration scandals, a recent loss of the House of Representatives, and public wariness over their signature issue, Reconstruction – sought a new campaign issue. They found it in the supposed Catholic threat to the public school. *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 48-49 (1992).

In September 1875, President Grant delivered a widely-publicized speech warning of a new civil war based not on race, but on religion. It would pit, he predicted, "patriotism" and "intelligence" against "superstition" and "ignorance." *The President's Speech at Des Moines*, The Republic, Nov. 1875, at 324. According to Grant, only the public school – "the promoter of that intelligence which is to preserve us as a free nation" – could prevent such conflict. *Id.* He urged the nation to "[e]ncourage free schools, and resolve that not one dollar of money appropriated to their support, no matter how raised, shall be appropriated to the support of any sectarian school." *Id.*

That December, Grant pressed Congress to adopt a constitutional amendment to do just that. Representative James Blaine took up the charge. Within days, he introduced an amendment to the United States Constitution to prohibit public funding of so-called sectarian schools. Viteritti, *supra*, at 670-72.

Blaine's amendment was a "transparent political gesture against the Catholic Church." *Id.* at 671. The term "sectarian" was widely understood as "Catholic," and even Blaine's sympathizers acknowledged the amendment was "directed against the Catholics" and would be used "to catch anti-Catholic votes." The Nation, Mar. 16, 1876, at 173.

Blaine's amendment passed overwhelmingly in the House but fortunately fell just shy of the supermajority needed in the Senate to proceed to the states for ratification. *Mitchell* summarized the sordid history leading up to the vote:

> Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic."

530 U.S. at 828 (plurality).

2. State Blaine History Is Likewise Steeped In Anti-Catholic Animus

Although Blaine's amendment failed, the matter did not die there. His sympathizers subsequently achieved through the back door what they could not achieve through the front: as new states entered the Union, Congress, through the enabling legislation facilitating their entry, required them to include Blaine-type provisions in their own constitutions. Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 513-14 (2003).

Even states that were not required to include Blaine provisions commonly did so, and for the same discriminatory reasons that animated the federal amendment. Colorado was one such state. Its constitutional convention commenced just six days after Blaine proposed his federal amendment and, thus, before Congress had begun mandating inclusion of Blaine language in state constitutions. The history of its Blaine Amendment is, like the history of the federal amendment, part of the record in *Doyle* and similarly steeped in anti-Catholic animus.

Numerous proposals were made at the convention's outset to prohibit public funding of so-called "sectarian" schools. *E.g.*, *Proceedings of the Constitutional Convention Held in Denver* 112-13, 185-86 (Smith-Brooks Press 1907). For example, former territorial governor John Evans petitioned on behalf of eleven Protestant churches for provisions to keep

public schools "free from sectarian" influence, prohibit diversion of funds to Catholic schools, and allow Bible reading in public schools. *Id.* at 112-13.

These proposals were championed in the media. For example, a *Rocky Mountain News* article warned that the "'antagonism of a certain church towards our American public school system,'" if left unchecked, would "'lay our vigorous young republic . . . bound with the iron fetters of superstition at the feet of a foreign despot.'" Charles L. Glenn, *The American Model of State and School* 171 (2012). And a *Boulder County News* editorial asked, in a tone religiously and racially charged, "'[I]s it not enough that Rome dominates in Mexico and all of South America?'" *Id.* at 172.

Governor Evans summarized the convention's atmosphere as "'much like the Know Nothing movement,'" with "'Republicans . . . going into secret societies against the Catholics.'" Like Blaine, he was happy to exploit the situation: "'I keep my hand covered while I stir them up.'" *Id.* at 171.

The delegates ultimately included Blaine language, and the *Rocky Mountain News* celebrated, explaining that "'far more protestants can be got to vote for the constitution on account of this very clause than catholics for the same reason to vote against it.'" *Glenn*, *supra*, at 73. It was right: the people ratified the constitution overwhelmingly, "'voting up,'" as a *Boulder County News* piece put it, what "'the Pope of Rome . . . [had] ordered voted down.'" Donald W.

Hensel, *Religion and the Writing of the Colorado Constitution*, 30 Church Hist. 349, 356 (1961) (alteration and omission in original).

3. This Court Should Not Countenance Extensions Of The Animus That Engendered Blaine Amendments

The national and state-level history of the Blaine movement lays bare the twin objects of the state constitutional provisions it engendered: (1) preservation of Protestantism in nineteenth-century public schools; and (2) prohibition of public funding of Catholic schools. Their history, like their text, demonstrates that they were not designed to reach programs that aid *students*. Yet that is how some courts, including the three-justice plurality in *Doyle*, are interpreting them today.

Although it is the purview of state courts to interpret and apply provisions of their own state constitutions, it is not their purview to interpret and apply them in a way that conflicts with the federal Constitution's command that states not inhibit religion. When state courts apply Blaine Amendments to programs that aid students, rather than institutions, they are, indeed, inhibiting religion. They are perpetuating the animus against a particular religion – Catholicism – that underlies the provisions, and in extending the provisions to bar families from choosing *any* religious schools, they are also transmuting these engines of discrimination against Catholicism

into engines of discrimination against religion in general. This Court should not allow it.

D. *Locke v. Davey* Does Not Authorize The Exclusion Of Religious Options From School-Choice Programs

Courts that rely on Blaine Amendments and compelled support clauses to exclude religious options from school-choice programs commonly invoke this Court's opinion in *Locke* as giving them federal constitutional license to do so. *Locke* gives no such thing. If anything, it indicates that such exclusions are *not* permissible: "The opinion . . . suggests, even if it does not hold, that the State's latitude to discriminate against religion is confined to certain 'historic and substantial state interest[s]' and does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian Univ.*, 534 F.3d at 1255 (citation omitted) (alteration in original) (quoting *Locke*, 540 U.S. at 725).

To be sure, *Locke* upheld a religion-based exclusion from an individual-aid program: the exclusion of students majoring in "devotional theology" from a postsecondary scholarship program. *Locke*, 540 U.S. at 715. In that sense, the program was not neutral toward religion. But the program *was* neutral toward religion as that term was used in *Mueller*, *Witters*, *Zobrest*, and *Zelman*: it afforded students the choice of attending a religious or non-religious school with

their scholarships. *Id.* at 716. Indeed, this Court stressed how the program went "a long way toward including religion in its benefits" by, among other things, "permit[ting] students to attend pervasively religious schools." *Id.* at 724. The narrow exclusion that the Court allowed was hardly the complete *banishment* of religious options that some courts claim *Locke* authorized.

"[T]he only [governmental] interest at issue" in *Locke*, moreover, was "the State's interest in not funding the religious training of clergy." *Id.* at 722 n.5. That interest is not implicated by religious options in elementary and secondary school-choice programs. And the very reason this Court stressed that that was the "only" interest at issue in *Locke* was to assuage Justice Scalia's concern that the Court's opinion might be viewed as "ha[ving] no logical limit" and as "justify[ing] the singling out of religion for exclusion from public programs in virtually any context." *Id.* at 730 (Scalia, J., dissenting). "Nothing in our opinion suggests" such a reading, the Court emphasized. *Id.* at 722 n.5. Yet that is the reading some courts have adopted. *E.g.*, *Taxpayers for Pub. Educ.*, 351 P.3d at 474 (plurality) (reading *Locke* as authorizing "state constitutions [to] draw a tighter net around the conferral of" aid to students – a net "far more restrictive than the Establishment Clause"); *Eulitt*, 386 F.3d at 355 (reading *Locke* "broadly" and rejecting argument that the "'play in the joints' identified by [*Locke*] is applicable to certain education funding decisions but not others").

What's more, *Locke* did not, according to the Court, involve a Blaine Amendment. *Locke*, 540 U.S. at 723 n.7.[8] The Court acknowledged that the Washington Constitution *contains* a Blaine Amendment and recognized the possibility that it is "linked with anti-Catholicism," but that provision was not at issue in the case. *Id.* Blaine Amendments, however, *are* commonly relied upon by those who argue that religious options must be barred from school-choice programs, and it was a Blaine Amendment that was relied upon in *Doyle* to bar religious options from the school-choice program at issue there. Thus, the history of these provisions, which was "simply not before" the Court in *Locke*, *id.*, *is* relevant in school-choice cases.

Finally, the "devotional theology" exclusion in *Locke* "d[id] not require students to choose between their religious beliefs and receiving a government benefit," because a student could pursue a devotional theology degree with his own money and "still use [his] scholarship to pursue a secular degree at a different institution." *Id.* at 720-21 & n.4. But barring religious options from school-choice programs *does* require students and their parents to choose between their religious beliefs and receipt of a government

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[8] *But see* Mark Edward DeForrest, Locke v. Davey: *The Connection Between the Federal Blaine Amendment and Article I, § 11 of the Washington State Constitution*, 40 Tulsa L. Rev. 295 (2004).

benefit. A third-grader, after all, cannot spend eight hours a day at a religious school on her parents' dime, then head off for a second course of study at a non-religious private school with a scholarship that evening. Nor could a child spend thirteen years (and her parents' money) on elementary and secondary education at a religious school, followed by another thirteen years on elementary and secondary education at a non-religious school with a scholarship.

In short, those who rely on *Locke* to expunge religious options from school-choice programs take the opinion for precisely what this Court said it was not: "without limit." *Id.* at 722 n.5. This Court should not let them continue taking liberties with its opinion.

III. Allowing States To Discriminate Against Religious Options In School-Choice Programs Would Be Devastating

Finally, the consequences of concluding that states may, consistent with the federal Constitution, bar religious options from school-choice programs would be devastating to the hundreds of thousands of students throughout the country who desperately need the educational alternatives that school choice provides. As noted above, 61 school-choice programs currently provide critical opportunities to approximately 1.3 million kindergarten-through-twelfth-grade students. A decision from this Court that allows

Blaine Amendments and other state constitutional provisions to be used to deny these children the choice of a religious school, even when it is the school their parents believe is best for them, would put their educational futures in peril. It would also substantially undermine the ability of legislators to use school choice to provide greater educational opportunity to future students.

Compounding the direness of that scenario is the fact that an overwhelming number of students participating in school-choice programs are highly vulnerable children with unique educational needs. In fact, school-choice programs are often targeted toward such students, including children from low-income families and children with disabilities.

Indiana's Choice Scholarship Program, for example, which is the largest elementary and secondary scholarship program in the nation by student participation, is designed for students of families earning less than 150 percent of the income level for federal free-and-reduced lunch. *See* Friedman Found. for Educ. Choice, *The ABCs of School Choice* 41 (2016 ed.).[9] The nation's second largest program, Florida's McKay Scholarship Program, was created for students with disabilities. *See id.* at 27. And the third largest, the Milwaukee Parental Choice Program,

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[9] Families of students with disabilities may earn 200 percent of the free-and-reduced lunch level.

serves students whose families earn less than three times the federal poverty level. *See id.* at 115.

School-choice programs, moreover, are often adopted to provide alternatives to students trapped in failing public schools. The program this Court upheld in *Zelman*, for example, was enacted to "provid[e] educational assistance to poor children in a demonstrably failing public school system." *Zelman*, 536 U.S. at 649. Similarly, the purpose of the Milwaukee Parental Choice Program "is to provide low-income parents with an opportunity to have their children educated outside of the embattled Milwaukee Public School system." *Jackson v. Benson*, 578 N.W.2d 602, 612 (Wis. 1998). And Congress enacted the D.C. Opportunity Scholarship Program to provide alternatives to students in the District of Columbia, where "only 10 percent of . . . fourth-graders could read proficiently" and, "[a]t the 8th-grade level, [only] 12 percent were proficient." Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, div. C, tit. III, § 302(3), 118 Stat. 3.

Sadly, as Justice Thomas noted in *Zelman*, these "failing urban public schools disproportionately affect minority children." *Zelman*, 536 U.S. at 681 (Thomas, J., concurring). For example, a congressionally-mandated study found that over 90 percent of students offered a scholarship under the D.C. Opportunity Scholarship Program were African-American. Patrick Wolf, *et al.*, U.S. Dep't of Educ., *Evaluation of the DC Opportunity Scholarship Program: First Year Report on Participation* 49 (April 2005). And an evaluation of the

Milwaukee Parental Choice Program similarly found that 62.4 percent of participating students were African-American, while 13.2 percent were Hispanic. Wis. Legis. Audit Bureau, *An Evaluation, Milwaukee Parental Choice Program*, No. 00-2, at 37 (Feb. 2000).

School-choice programs are an important "means of raising the quality of education provided to [these] underprivileged urban children," who are "most in need of educational opportunity." *Zelman*, 536 U.S. at 681, 683 (Thomas, J., concurring). This Court should not allow the educational opportunities that school choice is currently providing them to be placed in jeopardy.

CONCLUSION

This Court should reverse the judgment of the Eighth Circuit and hold that religion-based exclusions in public-benefit programs – whether they provide institutional or individual aid – violate the federal Constitution. If it so holds, then the Court should also grant the petition in *Doyle*, No. 15-556, vacate the judgment of the Colorado Supreme Court, and remand the case to that court for further consideration.

If, however, this Court holds that religion-based exclusions are permissible, it should limit its holding to the institutional-aid context and clarify that such exclusions are *not* permissible in school-choice and other individual-aid programs. Alternatively, it should

grant the petition in *Doyle* to resolve that issue – an issue *Doyle* squarely presents.

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IN THE
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Institutional Religious Freedom Alliance ("IRFA") is a national, nonpartisan, and multi-faith association of faith-based organizations ("FBOs"). IRFA works to protect the religious freedom of faith-based service organizations by educating the public, training organizations and their lawyers, creating policy alternatives that better protect religious freedom, and advocating such policy alternatives to the Executive Branch and Congress. IRFA's members and allies include charities, child-welfare organizations, schools, colleges, organizations that defend religious freedom, churches, and denominational agencies. IRFA seeks to ensure that FBOs can continue to make their distinctive contributions to the public good, and it equips organizations to adopt best practices that protect their religious rights.

This case has far-reaching implications for the FBOs that IRFA serves. These FBOs provide a diverse range of social services, including services to indigent and other at-risk populations, services to children, and health services. The Eighth Circuit's rule threatens to marginalize them by permitting States to discriminate against them in the provision

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[1] Counsel for Petitioner has filed, with the Clerk of this Court, blanket consent to the filing of *amicus curiae* briefs. In addition, counsel for Respondent has consented in writing to the filing of this brief. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

of public funding. This rule demeans religious practitioners and FBOs by singling out their religiously motivated social programs as uniquely unworthy of governmental support. In addition, this rule reduces the services FBOs can afford to provide and the number of individuals they can afford to serve, which, in turn, harms society more broadly.

SUMMARY OF ARGUMENT

Those who exercise religion, and their religiously motivated practices, enjoy special constitutional protection against "unequal treatment." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 542 (1993). The State of Missouri disregarded this first principle when it funded the playground resurfacing of a less-qualified secular applicant instead of a more-qualified religious applicant simply because the latter was religiously affiliated. If this Court sanctioned such religious discrimination, it would hobble numerous FBOs that, prompted by the faith that inspires and shapes their operations, provide essential social services to their communities. This hobbling, in turn, would harm those whom they serve.

I. Excluding FBOs from public grants imperils the broad range of services that such organizations provide to their communities. Motivated by diverse religious callings, people of faith often band together to form and operate FBOs that deliver social services to the poor, sick, and neglected. FBOs' work includes everything from prisoner-reentry programs to housing for abused women, from soup kitchens to hospitals, and from schools to crime-prevention programs.

When civic duty and religious calling converge, governments and FBOs mutually benefit by partnering to help those in need. By offering grants to both secular and religious entities, on equal terms, governments can leverage civil society's full armament of private institutions to fight poverty, disease, addiction, and other ills. Although partnerships between governments and FBOs encompass the full range of social services, three major categories, highlighted below, are exemplary: services to the poor and other at-risk populations, services to children, and health services.

If this Court endorsed Missouri's effort to cut off FBOs from government funding, FBOs would have fewer resources to deploy in their faith-motivated efforts to help their neighbors. And this, in turn, would send harmful ripples throughout society. Removing state funding from FBOs "not only suffocates social and religious pluralism by creating a monolithic, secular-dominated structure for the delivery of welfare services," but also "eliminates a fuller range of provider choices for the poor and needy." Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 285, 290 (1999).

II. Such exclusion of FBOs from otherwise neutral public grants not only demeans and handicaps religious practices but also undermines the secular purposes for the grants, contrary to the Free Exercise Clause.

First, when a government excludes FBOs from public grants because of their faith, it demeans religious practitioners and belittles their faith-based

practices. The "indignity of being singled out for special burdens on the basis of one's religious calling is . . . profound." *Locke v. Davey*, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting). Applying the general language of other provisions of the Constitution, this Court has acknowledged that racial and gender discrimination stigmatize and demean. Under the Free Exercise Clause, religious discrimination is at least no different. Discriminatory exclusion of FBOs thus runs afoul of the principle that "no person may be restricted or demeaned by government in exercising his or her religion." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2786 (2014) (Kennedy, J., concurring).

Second, when a government excludes FBOs from grant programs, it also handicaps religious practice, because religiously motivated conduct—namely, running social services programs for reasons of faith—suffers from reduced funding. Time and again, this Court has held that First Amendment rights are threatened when the government forces religious adherents to choose between violating their religious beliefs and suffering economic consequences. Yet Missouri has imposed this impermissible choice on in-state FBOs: Institutions must either tear out their religious hearts or hobble themselves financially in being able to serve their communities—while secular organizations that provide the same services benefit comparatively.

Third, when the government refuses to make grants available on equal terms to secular and religious institutions, it undermines the secular goals for its grant programs. This case is a vivid illustration: Missouri's grant program seeks to

promote playground safety. The State made fourteen grants, and it ranked Trinity Lutheran as the fifth-best applicant. But because the State excluded Trinity Lutheran due to its religious affiliation, grant money instead flowed to the fifteenth-ranked applicant (a secular institution). By the State's own lights, it provided money to an inferior applicant—and, therefore, advanced its goal of playground safety less effectively—simply because it did not want to fund a *religious* institution's playground.

ARGUMENT

I. EXCLUDING FAITH-BASED ORGANIZATIONS FROM GRANTS IMPERILS THE WIDE ARRAY OF SERVICES SUCH ORGANIZATIONS PROVIDE TO THEIR COMMUNITIES.

Throughout American history, "religion has been a powerful force, capable of producing immense and transformative social change." Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 Emory L.J. 19, 19 (2006). To produce this social change, people of faith frequently have united to operate FBOs that provide social services to the poor, ill, and oppressed. *See, e.g.*, Judith B. Goodman, *Charitable Choice: The Ramifications of Government Funding for Faith-Based Health Care Services*, 26 Nova L. Rev. 563, 571–72 (2002) (hereinafter "*Charitable Choice*"). FBOs' work has included prisoner-reentry programs, housing for abused women, soup kitchens, hospitals, schools, youth programs, and crime-prevention programs. FBOs have provided these "works of mercy, love, peace, and justice, with and without government money, because of a divine mandate." *Id.* at 604.

Today, FBOs continue to "play a large and vital role in the provision of social services" because they are well-positioned to serve their communities. Robert W. Carter, Jr., *Faith-Based Initiatives: Expanding Government Collaboration with Faith-Based Social Service Providers*, 27 Seton Hall Legis. J. 305, 309–10 (2003). Although many social service providers "are often too bureaucratic, inflexible, and impersonal to meet the acute and complex needs of the poor," "faith-based and community organizations . . . are close to the needs of people and trusted by those who hurt."[2] As a result, FBOs frequently can "gather information" that will aid clients and can be "more easily accessible to clients than other providers." Carter, *supra*, at 309–10.

Governments at every level—local, state, and federal—have goals that overlap with those of FBOs. As a result, "[p]artnerships between government and religiously affiliated entities have deep roots in the United States." Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DePaul L. Rev. 1, 5 (2005) (hereinafter "*Faith-Based Initiative*"); *see also* Ian Bartrum, *The Constitutional Structure of Disestablishment*, 2 NYU J.L. & Liberty 311, 344–45 (2007) ("Government funding of religious charities is not a new idea."). In the mid-1800s, "both Protestant and Catholic institutions received aid for programs to help orphans, alcoholics, juvenile delinquents, and the mentally ill." *Id.* at 344–45. As the need for these charities grew more

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[2] President George W. Bush, Rallying the Armies of Compassion, http://tinyurl.com/hr2wbkg.

acute due to "widening gaps in state social services," churches, with the help of government funding, "gradually built an infrastructure of support organizations" to provide the necessary services. *Id.*

In the modern era, even as government agencies have gained "a near monopoly over the resources available for social welfare spending," they have continued to incorporate and depend on FBOs in the provision of social services. Esbeck, *supra*, at 290. Such partnerships rest on the principle that "our call as people of faith" and "our duty as citizens of America" can "bring us together to feed the hungry and comfort the afflicted; to make peace where there is strife and rebuild what has broken; [and] to lift up those who have fallen on hard times."[3] When civic duties and religious convictions align, then, it is no surprise that governments and FBOs cooperate.[4]

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[3] Remarks of President Barack Obama: National Prayer Breakfast, Feb. 5, 2009, http://tinyurl.com/jfho4ew.

[4] In the examples below, *amicus* emphasizes state funding from Arizona, Colorado, Florida, Illinois, Michigan, Minnesota, Nevada, Pennsylvania, Virginia, and Washington, all of which have "mini-Blaine amendments," which prohibit state funding "in aid of," "for the benefit of," or for the "support" of religious institutions (or, in Nevada's case, state funding for a "sectarian purpose"). *See* ARIZ. CONST. art. II, § 12; COLO. CONST. art. IX, § 7; FLA. CONST. art I, § 3; ILL. CONST. art. X, § 3; MICH. CONST. art. I, § 4; MINN. CONST. art I, § 16; NEV. CONST. art. XI, § 10; PA. CONST. art. 3, § 29; VA. CONST. art. IV, § 16; WASH. CONST. art. I, § 11. Unlike Missouri, these States acknowledge that financial support to FBOs may advance shared goals without advancing religion. *See, e.g., Center for Inquiry, Inc. v. Jones*, No. 2007-CA-1358, at *14 (Fla. Cir. Ct. Jan. 20, 2016) (unpublished judgment), http://tinyurl.com/zltdejb (holding that

Partnerships between governments and FBOs span the full range of social services. This brief highlights three major categories to illustrate the types of programs that would suffer from the exclusion of religious entities from government funding: (1) services to the poor and other at-risk populations, (2) services to children, and (3) health services.

Services to the Poor and Other At-Risk Populations

When governments aid the indigent and other at-risk populations, they often find it "useful to contract for social services with organizations like Catholic Charities, Lutheran Social Services, and Jewish Family Services," all of which "have religious identities . . . but . . . do not engage in practices of worship or religious training." *Faith-Based Initiative*, *supra*, at 5. Catholic Charities USA, for example, among the largest charities in America, offers nearly $4 billion in charitable services to approximately 8.7 million people each year. [5] Catholic Charities strives to "witness the love of

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(continued...)

a contract with a religious organization violates Florida's mini-Blaine Amendment *only* if, "in addition to providing social services, the government-funded program . . . also advance[s] religion"). If this Court upheld the Eighth Circuit's rule, however, such States would be particularly at risk of categorically excluding FBOs from public grants, by applying their mini-Blaine amendments.

[5] FORBES, The 50 Largest U.S. Charities, http://goo.gl/mzXFFm; CATHOLIC CHARITIES, The Catholic Charities Network, https://goo.gl/CyPE1g.

Christ by helping people in need and by serving their communities."[6] To fulfill its mission, it provides a broad array of social services, including, among other things, disaster relief, emergency housing, counseling services, job training, services to immigrants, and meals for seniors and the homeless.[7] For example, in addition to offering immigrants its "full spectrum of community services," Catholic Charities seeks to help them "by providing interpretation, employment training, job placement and counseling services" and by offering "legal . . . services to clients with family-based cases and with applications for legal residence, deferred action for childhood arrivals, and citizenship."[8] Last year, it served 400,000 refugees and immigrants, who, with this critical assistance, found "homes and jobs," "learn[ed] how to speak English and how to navigate our American systems," went "to school, launch[ed] businesses, buil[t] assets and bec[a]me contributing citizens."[9]

Because state governments also seek to fight poverty and serve at-risk populations, many partner with Catholic Charities and fund some of its operations. In Colorado, for example, Catholic Charities receives funding from at least six county departments, as well as the Colorado Department of

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[6] CATHOLIC CHARITIES, Home, https://goo.gl/KHlSKr.

[7] CATHOLIC CHARITIES USA, What We Do, https://goo.gl/ZrH1qJ.

[8] CATHOLIC CHARITIES USA, Welcoming Newcomers, https://goo.gl/Hu41s5.

[9] *Id.*

Health and Human Services.[10] The State recently awarded Catholic Charities of Central Colorado a $70,000 grant to help it "expand services to families in a 10-county region of Colorado."[11] The funds will support more than twenty-five programs, including aid to homeless families, financial literacy classes, counseling efforts, a soup kitchen, an English-as-a-Second-Language class, and other childhood education efforts.[12]

Many States have awarded similar grants to Catholic Charities. In 2009, Illinois granted Catholic Charities $7 million for its social services programs.[13] Nevada recently awarded Catholic Charities nearly $2 million to expand its food delivery program to 5,000 needy families in rural communities throughout the State.[14] Each year in Pennsylvania, state and county grants enable Catholic Charities for the Diocese of Allentown to support approximately 1,000 veterans who are homeless or at risk of homelessness, by "helping

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[10] *See* CATHOLIC CHARITIES: DIOCESE OF PUEBLO, FAQs, http://goo.gl/H5aEn2.

[11] Amy Gillentine Sweet, *Catholic Charities Receives Grant*, THE COLORADO SPRINGS BUSINESS JOURNAL (Mar. 17, 2016), http://goo.gl/IeHEd8.

[12] *See id.*

[13] Robert Becker & Ray Long, *Church-State Debate: Religious Groups Slated for Illinois Grants*, CHICAGO TRIBUNE (Oct. 13, 2009), http://goo.gl/WqfT3f.

[14] *See* Paul Nelson, *Catholic Charities to Expand Service to Rural Nevada* (June 4, 2015), http://goo.gl/51JyGT.

[them] secure housing and employment" and providing "help with rent, utilities, moving expenses, emergency support, transportation and child care."[15] In addition, the Arizona Department of Veterans Services awarded Catholic Charities a $41,250 grant for a similar program.[16]

As another example, the Salvation Army provided $2.8 billion in charitable services in 2014.[17] "[A]n evangelical part of the universal Christian Church," the Salvation Army's "mission is to preach the gospel of Jesus Christ and to meet human needs in His name without discrimination."[18] To do so, it "serves 60 million meals . . . through its many soup kitchens, sit-down meal programs, food pantries, mobile meals and community gardens."[19] It also runs "[g]roup homes, emergency shelters, and transitional living centers [that] provide housing, food, and overnight lodging," as well as "educational, counseling and vocational services to homeless, destitute individuals

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[15] PENNSYLVANIA CATHOLIC CONFERENCE, Supportive Services for Veteran Families, Nov. 7, 2014, http://goo.gl/Uwo3RF. Catholic Charities for the Diocese of Erie, Pennsylvania, reports that state and local governments provided nearly 12% of its annual revenue in 2014. *See* CATHOLIC CHARITIES: DIOCESE OF ERIE, 2014 Annual Report, http://goo.gl/ecydqD.

[16] *See* ARIZONA DEPARTMENT OF VETERANS' SERVICES, Arizona Veterans' Donation Fund, https://goo.gl/9gGWPn.

[17] THE SALVATION ARMY, 2014 Financial Summary: Expenses, http://goo.gl/1RbUaw.

[18] THE SALVATION ARMY, Mission Statement, http://goo.gl/Eupy4O.

[19] THE SALVATION ARMY, Hunger Relief, http://goo.gl/uj16od.

and families, and youth where family care is undesirable or unavailable."[20]

State funding supports many of these programs. Illinois, for example, provided nearly $120,000 in grants to the Salvation Army for its homeless shelter and other social-service programs in 2014, and another $40,000 in 2015.[21] In Florida, the Board of County Commissioners funded the Salvation Army's Emergency Bridge Housing Program and "ensure[d] sufficient housing . . . , case management and bus passes [were] available to homeless men, women and children in unincorporated regions" of the State.[22]

States have also funded Habitat for Humanity, an ecumenical Christian organization "dedicated to eliminating substandard housing and homelessness."[23] For example, the Michigan State Housing Development Authority recently provided

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[20] THE SALVATION ARMY, Housing and Homeless Services, http://goo.gl/uURRRN. Additionally, the Texas Muslim Women's Foundation annually "provides assistance to hundreds of families . . . faced with crisis," particularly to victims of domestic abuse. TEXAS MUSLIM WOMEN'S FOUNDATION, Social Services, http://goo.gl/Cy7pIF. With the help of federal funding, this organization provides short-term financial assistance, food, shelter, and basic needs, transitional housing, and crisis counseling. *See id.*; U.S. GOVERNMENT, Recipient Profile: Texas Muslim Women's Foundation, https://goo.gl/6VZmhJ.

[21] *See* Sharon Woods Harris, *State Budget Forces Salvation Army Campaign Hike*, PEKIN DAILY TIMES (Oct. 26, 2015), http://goo.gl/9UOao0.

[22] THE SALVATION ARMY: TAMPA, Grants, http://goo.gl/uKPHG1.

[23] HABITAT FOR HUMANITY, Christian Ministry, http://goo.gl/tjXtJW.

Habitat for Humanity with "$825,000 in funding to help more than 60 families move closer to owning their own homes."[24]

Services to Children

FBOs also provide countless services to children. The Young Men's Christian Association ("YMCA"), for example, seeks to build strong communities through youth development programs.[25] Its "mission is to put Christian principles into practice through programs that build healthy spirit, mind and body for all."[26]

Several States provide funding for these efforts. The Washington Department of Commerce awarded $2 million to the Gordon Family YMCA as part of the State's Building Communities Fund grant program.[27] The State earmarked these funds for constructing a facility to house "an aquatics center, wellness areas, multiple gyms, arts and teen centers, youth and teen programs and a community room."[28] Pennsylvania provided a $1 million grant to the Greater Johnstown Community YMCA to update existing facilities and "move th[e] community to a better place

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[24] Associated Press, *Habitat for Humanity of Michigan Getting $825,000 Grant*, CLICK ON DETROIT (Feb. 19, 2016), http://goo.gl/hdh5ie.

[25] *See* YMCA, Our Focus, http://www.ymca.net/our-focus.

[26] YMCA, Home, http://www.ymca.net/.

[27] Kari Plog, *Sumner YMCA Receives $2 Million as Part of State Budget Deal*, THE NEWS TRIBUNE (July 2, 2015), http://goo.gl/KHff1a.

[28] *Id.*

for the youth, the adults, families, senior citizens and vulnerable populations."[29]

State funding may also be earmarked for specific YMCA programs that impact youth. For example, the Michigan Department of Community Health awarded the YMCA a $400,000 grant to support its programs throughout the State.[30] $50,000 of this grant went to facilities in the Lansing area to support "work to teach children healthy habits and address childhood obesity through physical activity and before/after school and summer programming."[31]

The Inner-City Muslim Action Network similarly works to "empower[] local youth through leadership development and civic engagement."[32] Through its Youth Council, the Network trains "dynamic youth leaders" who "gain more knowledge and experience," "hone effective communication skills," and develop strategic campaigns in three key areas: "Food Access, Juvenile Justice, and Youth Employment."[33] In recognition of these valuable contributions, Illinois

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[29] Justin Dennis, *$1M State Grant Boosts YMCA Facility Upgrades*, THE TRIBUNE-DEMOCRAT (Oct. 2, 2014), http://goo.gl/H7nzXe.

[30] Michelle Rahl, *YMCA of Lansing Receives State Grant to Teach Children Healthy Lifestyles*, LANSING REGIONAL CHAMBER (Oct. 30, 2014), http://goo.gl/n7DG3w.

[31] *Id.*

[32] INNER-CITY MUSLIM ACTION NETWORK, About Us, http://goo.gl/Cb3aF4.

[33] INNER-CITY MUSLIM ACTION NETWORK, Youth Services, http://goo.gl/RzXA3T.

and the City of Chicago provide funding for the Network's programs.[34]

States also provide funding to various religious schools. In Pennsylvania, for instance, religious schools receive millions of dollars in state funding.[35] The State paid two hundred Catholic schools in the Philadelphia region nearly $9 million for schoolbooks and supplies.[36] New York similarly supports religious schools.[37] And, in 2009, Illinois's construction program provided "more than 100 grants to religious organizations," including "$100,000 to Telshe Yeshiva school . . . for renovations; $700,000 to St. Malachy School for capital improvements; and $750,000 to St. Anthony W.W. Temple for costs associated with capital

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[34] INNER-CITY MUSLIM ACTION NETWORK, Some of Our Funders, http://goo.gl/IpQhi5.

[35] *See* Susan Snyder, *Pa. Budget Crunch Squeezes Catholic Schools* (Oct. 12, 2015), http://goo.gl/Jxw9rF.

[36] *See id.*; Amy Hill, *Catholic Agencies Glad for Break in Pa. Budget Impasse* (Dec. 30, 2015), http://goo.gl/YMv9ce (noting that funding for religious schools and other private schools would be used to purchase "textbooks, materials, equipment and services that support [students'] secular education").

[37] NEW YORK STATE CATHOLIC CONFERENCE, *State Budget Agreement Increases Funding for Catholic Schools* (Mar. 25, 2013), http://goo.gl/PcSfPT. New York also has a mini-Blaine amendment, but, unlike the provisions cited in footnote 4, it bars funding "in aid . . . of" religious schools, not religious institutions generally. *See* N.Y. CONST. art. XI, § 3.

improvements."[38]

Finally, many States support programs for prisoners' children. Amachi, a Christian entity, is a prime example. It strives to break the cycle of intergenerational criminal behavior and incarceration by providing prisoners' children with "the consistent presence of loving, caring people of faith." [39] When Amachi proved successful in Philadelphia, the Pennsylvania Department of Community and Economic Development granted it funds "to provide training . . . and to encourage [other] states to create dedicated funding for mentoring-children-of-prisoners programs."[40] As a result, some twenty States committed to the Amachi program.[41]

In Texas, Amachi teamed with Big Brothers Big Sisters Lone Star.[42] The joint program relies on contributions from the Governor's office, the OneStar Foundation, and the Texas Department of Criminal Justice.[43] It began with a $3.7 million grant from

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[38] Robert Becker & Ray Long, *Church-State Debate: Religious Groups Slated for Illinois Grants*, CHICAGO TRIBUNE (Oct. 13, 2009), http://goo.gl/WqfT3f.

[39] AMACHI, About Us, http://goo.gl/iQKo0k.

[40] Thomas J. Smith, *The Least of These: Amachi and the Children of Prisoners*, at 11, http://goo.gl/gYpdPC.

[41] *See id.*

[42] AMACHI, Home, http://goo.gl/tvXju6.

[43] *See* Traci Shurley, *Somebody to Lean On Program Gives Guidance to Children of Inmates*, THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, https://goo.gl/wTXjXq.

Texas.[44] Texas also provided a $300,000 grant in 2006, a $500,000 two-year grant in 2007, and another $500,000 two-year grant in 2009.[45] The program has connected hundreds of children with "role models from all walks of life, but particularly those from local religious organizations."[46] And its success depends, at least in part, on "[h]ouses of worship and their members," which "are able to provide a safe, stable environment for children to develop into responsible young men and women."[47]

Health Services

"[T]here is a long history of government funding going to church hospitals . . . starting at the turn of the [twentieth] century." *Charitable Choice*, *supra*, at 586. "Traditional religious providers, whether Catholic, Jewish, Methodist, or Baptist, all have long and successful hospital traditions." *Id.* at 590. "Among religious hospitals," though, "Catholic hospitals have predominated." Michael J. DeBoer, *Religious Hospitals and the Federal Community Benefit Standard—Counting Religious Purpose as a Tax-Exemption Factor for Hospitals*, 42 Seton Hall L. Rev. 1549, 1556 (2012). In 2009, there were over 600 Catholic hospitals in the United States, and "eleven of the forty largest hospital systems in the United States [were] Catholic." *Id.* at 1556–67. Sixteen

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[44] *See id.*

[45] Thomas J. Smith, *supra*, at 12.

[46] BIG BROTHERS BIG SISTERS, Amachi Texas, http://goo.gl/QkpzXJ.

[47] *Id.*

percent of all patients admitted to hospitals that year were admitted to hospitals affiliated with the Catholic Church, and, when taken together, such hospitals "make up the largest private nonprofit health-care system in the nation." *Id.* at 1557.

Religious hospitals regularly receive state funding. The Minnesota Department of Health, for example, "provide[s] funds to non-profit organizations promoting healthy pregnancy outcomes and assisting pregnant and parenting women in developing and maintaining family stability and self-sufficiency."[48] FBOs are eligible for this funding and "may use their facilities to provide grant funded services without removing or altering religious art, icons, scriptures, or other symbols from these facilities."[49] Colorado also provides financial support to religious hospitals.[50]

Florida provides similar funding for FBOs' drug rehabilitation efforts.[51] Following a "competitive public procurement process," the Florida Department of Corrections awarded contracts to Lamb of God Ministries and Prisoners of Christ, FBOs that provide substance-abuse programs to recently

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[48] MINNESOTA DEPARTMENT OF HEALTH, Positive Alternatives Overview, http://goo.gl/uu9wPT.

[49] MINNESOTA DEPARTMENT OF HEALTH, Positive Alternatives Application Questions, http://goo.gl/xN7ac2.

[50] *See, e.g.*, NATIONAL JEWISH HEALTH, 2015 Annual Report, https://goo.gl/xa2wnn.

[51] *See Center for Inquiry*, No. 2007-CA-1358, at *2.

released prisoners.[52] The Department has found that the optional faith components of such rehabilitation programs are "effective for offenders who wish to integrate their faith with their recovery."[53] As such, it has renewed contracts with these FBOs for more than ten years and annually funds between 20% and 33% of their operations.[54]

Moreover, the Virginia Department of Behavioral Health and Developmental Services recently granted United Methodist Family Services ("UMFS") more than $800,000 "to improve 'systems of care' for children with mental illness and their families."[55] UMFS "do[es] whatever it takes to empower high-risk children, their families and communities throughout Virginia," including by "addressing behavioral and emotional issues [and] finding foster homes."[56] The grant supports training efforts and has allowed UMFS to hire six parent-support partners.[57]

The Virginia Department of Social Services has

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[52] *Id.* at 5–6.

[53] *Id.* at 10.

[54] *Id.* at 11–12.

[55] Tammie Smith, *Methodist Family Services Initiative Helps Children with Behavioral Health Issues*, RICHMOND TIMES-DISPATCH (Aug. 14, 2014), http://goo.gl/i0p4Ie.

[56] UNITED METHODIST FAMILY SERVICES, Home, https://www.umfs.org/.

[57] Tammie Smith, *supra*.

provided similar funding to UMFS.[58] In 2009, for example, it contracted with UMFS to help youth "transition[] out of foster care statewide."[59] It later expanded on that contract and provided an additional $125,000 to UMFS to help support families who adopted children from other countries.[60]

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When a state withdraws funding from FBOs such as the ones discussed above, it has wide-ranging consequences. The remainder of this brief explores these detrimental and unconstitutional effects.

II. EXCLUDING FAITH-BASED ORGANIZATIONS FROM OTHERWISE NEUTRAL GRANTS NOT ONLY DEMEANS AND HANDICAPS RELIGIOUS PRACTICE BUT ALSO UNDERMINES THE GRANTS' SECULAR PURPOSES.

One way to abridge the free exercise of religion is to subject religious practitioners and their religious practices to "unequal treatment." *Lukumi*, 508 U.S. at 532, 542; *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in the judgment). That the government "cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Lukumi*, 508 U.S. at 543. The unequal treatment here—the exclusion of

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[58] *See* VIRGINIA DEP'T OF SOCIAL SERVICES, Annual Progress Report, https://goo.gl/UKRSxI.

[59] *See id.* at 26.

[60] *See id.* at 14.

FBOs from otherwise neutral public grants—has at least three harmful effects that undermine its constitutionality.

First, excluding FBOs from public grant programs demeans religious practitioners and belittles their faith-based practices. In *Lukumi*, for instance, this Court emphasized that discrimination against religiously motivated conduct improperly "*devalues* religious reasons" for a practice "by judging them to be of lesser import than nonreligious reasons." *Id.* at 537–38 (emphasis added). Such discrimination is "demoralizing and stigmatic." Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 29, 35 (1976); *see, e.g.*, *Heckler v. Mathews*, 465 U.S. 728, 739 (1984) (noting, in a case involving a gender-based classification, that discrimination can "stigmatiz[e] members of the disfavored group as 'innately inferior'"). Discriminatory exclusion of FBOs therefore contravenes the rule that "no person may be restricted or demeaned by government in exercising his or her religion." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

"The indignity of being singled out for special burdens on the basis of one's religious calling is . . . profound." *Locke*, 540 U.S. at 731 (Scalia, J., dissenting). As such, the "concrete harm produced [by such discrimination] can never be dismissed as insubstantial." *Id.* This Court "has not required proof of 'substantial' concrete harm with other forms of discrimination, and it should not do so here." *Id.* (internal citations omitted); *see* Brest, *supra*, at 9 ("Recognition of the stigmatic injury inflicted by discrimination explains applications of the

antidiscrimination principle where the material harm seems slight . . . .").

What the express terms of the Free Exercise Clause require with respect to religious practice is confirmed by this Court's jurisprudence under more general constitutional protections. Consider precedent involving racial discrimination. In *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court held that segregated educational systems deprive racial minorities of equal protection, "even though the physical facilities and other 'tangible' factors may be equal," because of the demeaning and stigmatizing effect of discrimination. *Id.* at 493–95. Separating children "from others of similar age and qualifications solely because of their race," the Court explained, "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494.

So too for sex discrimination. Differential treatment of potential jurors based on their sex "is 'practically a brand upon them, affixed by the law, an assertion of their inferiority.'" *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994). Such discrimination "denigrates the dignity of the excluded juror" and sends a "message . . . that certain individuals, for no reason other than gender, are presumed unqualified." *Id.*; *see also Heckler*, 465 U.S. at 739 (describing stigmatic harm in the context of gender discrimination).

In short, discrimination is demeaning. And because the "free exercise" of religion is "essential in preserving [the] dignity" of people of faith, *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring),

discriminatory treatment of FBOs tramples the dignity of religious adherents who provide social services through FBOs.

Second, the exclusion of FBOs from grant programs handicaps religious practice. As discussed above, FBOs provide an array of social services due to the religious convictions of those who run the organizations. Many FBOs, for example, motivated by the biblical injunction to "give[] . . . food to the hungry and provide[] clothing for the naked," operate homeless shelters that provide food and clothing to those in need. Ezekiel 18:7. When the government excludes such organizations from grant programs merely because they are religious, it "burdens . . . conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543.

In particular, the resulting decrease in funding to FBOs encumbers religiously motivated conduct—namely, the provision of social services for reasons of faith. The government threatens First Amendment rights when it thus forces religious adherents to choose between violating their religious beliefs or suffering economic consequences. In *Rosenberger v. Rector and Visitors of the U. of Va.*, for instance, this Court held that excluding a student organization from certain funding—merely because the organization was religious—violated the First Amendment. 515 U.S. 819, 822–23, 837 (1995). Moreover, when "Orthodox Jewish merchants" who closed their stores on Saturday for religious reasons contended that "requiring them to remain shut on Sunday threatened them with financial ruin," this Court "entertained their claim" under the Free Exercise Clause. *Hobby Lobby*, 134 S. Ct. at 2767

(discussing *Braunfeld v. Brown*, 366 U.S. 599 (1961)). More recently, this Court held that imposing significant "economic consequences" on those who will not abandon their religious beliefs about contraception "amount[s] to a substantial burden." *Id.* at 2759, 2775; *see also Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 717–18 (1981) ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."); *Sherbert v. Verner*, 374 U.S. 398, 399, 403–04, 410 (1963) (forcing employee to forgo wages or violate religious convictions violated Free Exercise Clause).

Moreover, the *relative* impact of such a religious exclusion exacerbates this harm suffered by FBOs. When the government denies FBOs the ability to "compet[e] on an equal footing in [their] quest for a benefit," secular organizations that provide the same services receive a leg up and become relatively more likely to flourish. *See Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666–67 (1993) (holding that a race-based denial of the ability "to compete on an equal footing in the bidding process" for government contracts constitutes injury in fact); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211–12 (1995) (same). When the government plays favorites in this manner, it improperly places faith-based social services providers at a disadvantage relative to nonreligious entities that perform identical services.

The government cannot impose such an unequal burden absent a compelling, nondiscriminatory justification, which the State of Missouri lacks here.

This Court has made clear that, when evaluating a claim that a government has infringed religious freedom, it is important to compare the effect that a policy has on religious persons to the effect that same policy has on nonreligious persons. In *Braunfeld*, this Court evaluated the Free Exercise claim brought by Orthodox Jewish merchants who claimed that a ban on Sunday sales infringed their religious rights because it would cause them "substantial economic loss, to the benefit of their non-Sabbitarian competitors." 366 U.S. at 601–02 (plurality); *see also id.* at 522 (opinion of Frankfurter, J.) (analyzing "the disadvantage wrought by the nonexempting Sunday statutes"). Although the claim failed on the merits, the Court considered the relative impact of the law on religious persons, as compared to the effect the law had on nonreligious persons. *See id.* at 605–06, 608–09 (plurality opinion); *id.* at 610–11, 613 (Brennan, J., concurring in part and dissenting in part).

The Court underscored the same point in *Hobby Lobby*. One contention in that case was that stiff penalties on companies that did not provide health insurance (including contraceptives) imposed no burden at all, because the companies could "readily eliminate any substantial burden by forcing their employees to obtain insurance in the government exchanges." 134 S. Ct. at 2776. The Court rejected this argument, largely because companies that eliminated a health-insurance benefit "without offering additional compensation . . . would face a

competitive disadvantage in retaining and attracting skilled workers." *Id.* at 2776–77 (emphasis added).

Third, excluding FBOs from grant programs undermines the programs' secular purposes. Such purposes, which FBOs can and do assist the state in accomplishing, range from feeding the hungry and sheltering the homeless to promoting recovery from substance abuse and fostering healthy childhood development. To reduce the number of organizations able to benefit the needy via such programs, shrinking the "market," hardly advances the programs' secular purposes. Indeed, because FBOs such as those detailed above in Part I are often in a better position to achieve these goals, their exclusion flies in the face of the state's secular goals.

In this case, for example, the Missouri grant program aims to improve playground safety. Missouri, like all States, has scarce financial resources; therefore, it seeks to achieve this goal by funding the most qualified grant applicants.

Missouri received forty-four grant applications under its scrap tire program, and it made fourteen grants. *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 782 (8th Cir. 2015). As the fifth-ranked grant applicant, Trinity Lutheran not only possessed the requisite qualifications but even surpassed two-thirds of the grantees. *See id.* But because the State excluded Trinity Lutheran for religious reasons, grant money flowed instead to the fifteenth-ranked applicant, simply because that less-qualified applicant was secular while the more-qualified applicant was religious. *See id.*

For a government to undermine its own secular purposes in this way is inconsistent with *Lukumi*. In that case, the ordinances were "underinclusive" because they sought to advance secular interests in promoting public health and preventing animal cruelty by restricting religiously motivated animal killing, while "fail[ing] to prohibit nonreligious conduct that endangers [the secular] interests in a similar or greater degree than [religious] sacrifice does." *Lukumi*, 508 U.S. at 543; *see also id.* at 546 ("The proffered objectives are not pursued with respect to analogous non-religious conduct . . . ."); *id.* at 578 (Blackmun, J., concurring in the judgment) (explaining that a state may not "create an underinclusive statute" that fails to restrict the "allegedly harmful conduct"). That is, the secular purposes in *Lukumi* were not materially advanced because the ordinances singled out "only conduct motivated by religious conviction" to "bear[] the weight of . . . governmental restrictions." *Id.* at 547.

Missouri's exclusion of FBOs from its scrap tire program suffers from a similar flaw. The City of Hialeah erred by singling out religiously motivated conduct when imposing a burden, even though the analogous secular conduct implicated the City's secular objectives to a similar or greater degree. Here, Missouri has singled out religiously motivated conduct when determining eligibility for a benefit, even though the excluded religious entity (Trinity Lutheran) would serve the State's secular objectives to a greater degree.

In fact, the State of Missouri's approach is more counterproductive than the policy in *Lukumi*. In *Lukumi*, the City's targeting of a religious

organization advanced its purported secular purpose to some extent, even though the City would have advanced that interest *even more* if it had evenhandedly applied its regulation to religious and nonreligious animal killings. Here, however, the State of Missouri's exclusion of Trinity Lutheran *undercuts* the State's secular objective. Both the City of Hialeah and the State of Missouri burdened religious exercise—but only Missouri, in doing so, was *at the same time* undermining its secular purpose.

An example from Florida confirms that the exclusion of FBOs from public grants undercuts secular objectives. Florida allows "private organizations, including faith-based ones, to bid on contracts to provide substance abuse and transitional housing services" to recently released convicts. *Center for Inquiry*, No. 2007-CA-1358, at *5. The State's secular goals are "criminal rehabilitation, the successful reintegration of offenders into the community, and the reduction of recidivism," particularly "criminal recidivism associated with and exacerbated by drug addiction." *Id.* at 16–17. After a competitive bidding process, the State awarded contracts to two FBOs, and it has renewed those contracts for more than a decade. *See id.* at 5–6. The State could not purchase the services provided by the FBOs—food, shelter, clothing, substance-abuse counseling, transportation, medical and dental services, and education—"as cheaply from other sources because the amounts paid [did] not even cover the [FBOs'] overhead." *Id.* at 9. The FBOs "provide[d] these services at a loss" and "continue[d] to house, feed, and provide services to

State clients when the State funds run short." *Id.* at 11.

If Florida had adopted Missouri's approach—that is, denying funding to FBOs due to their religious nature—the State would have been required to pay more for the needed services. *See id.* at 9. The exclusion would have undermined the State's secular goals because, in the absence of the partnership with FBOs, the State's funds would have reached fewer criminals in need of rehabilitation, reintegrated a smaller number of recently released offenders, and left a greater percentage of drug-addicted offenders without the support needed to prevent future criminal activity. Moreover, excluding FBOs would have diminished the impact of the State's funding, given that some prisoners are more likely to respond positively to programs that "integrate their faith with their recovery." *See id.* at 10.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, the Eighth Circuit's decision should be reversed.

Respectfully submitted,

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TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR, MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Eighth Circuit should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). JFF has made numerous appearances in this Court as *amicus curiae*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Government aid to religious organizations has generated heated debate over the course of American history. This nation is unique in its robust protection for religious liberty, guarding religion from both

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

government compulsion and interference. Since absolute separation is neither wise nor feasible, courts have tried to flesh out the appropriate church-state relationship over decades of litigation. A fairly strict "no-aid" position prevailed in this Court after the tripart *Lemon* test was inaugurated. *Lemon v. Kurzman*, 403 U.S. 602 (1974). That approach was eventually replaced by a growing trend toward nondiscrimination, resurrecting and strengthening the weak nondiscrimination principle evident in earlier cases such as *Everson v. Board of Education*, 330 U.S. 1 (1947). Since its holding in *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), this Court has increasingly advanced nondiscrimination over the no-aid standard that prevailed in previous years. The same trend is evident in other contexts, including equal access to school facilities and equal funding for religious viewpoints.

The nondiscrimination trend developed mostly in the context of Establishment Clause challenges filed by taxpayers. A strong consensus emerged that the Constitution permitted state funds to reach religious organizations under limited conditions—most notably, as the result of private choices. But this line of authority failed to articulate exactly if or when the state *must* include religious organizations among other eligible recipients. *Locke v. Davey*, 540 U.S. 712 (2004) appears to say "no," but its narrow parameters discourage extending its conclusion to other circumstances. Missouri's Scrap Tire Program disburses funds based on neutral criteria and serves broad community purposes unrelated to religion—child safety and environmental care. To further complicate the analysis, many state constitutions, including

Missouri, rigidly deny any and all financial aid to religion. These provisions are typically rooted in nineteenth century anti-Catholic bias, a position antithetical to the federal Constitution in general and nondiscrimination principles in particular. In following its strict state constitution, Missouri discriminates against religion, denying Trinity Lutheran's application for the tire program solely because of its religious character. Missouri uses its state constitution as a sword to discriminate against religion rather than a shield to protect it. Yet the federal Religion Clauses prohibit both favoritism *and* animosity toward religion.

Nondiscrimination promotes the "benevolent neutrality" that should characterize all levels of American government. Missouri's rigid exclusion of churches is neither benevolent nor neutral. This Court should continue its direction toward nondiscrimination, apply strict scrutiny to Missouri's infringement of religious liberty, and require Missouri to grant equal treatment to both secular and religious organizations that apply and qualify for the Scrap Tire Program.

ARGUMENT

I. FEDERAL ESTABLISHMENT CLAUSE JURISPRUDENCE HAS SHIFTED FROM A RIGID "NO AID" POSITION TO PRINCIPLES OF NONDISCRIMINATION.

Over the past few decades, Establishment Clause jurisprudence has gradually progressed from a strict "no aid" stance to a point where "federal constitutional restrictions on funding religious institutions have collapsed." Douglas Laycock, Comment, *Theology Scholarships, The Pledge of Allegiance, and Religious*

Liberty: Avoiding the Extremes but Missing the Liberty, 118 Harv. L. Rev. 155, 156 (2004). Instead of "a substantive liberty, triggered by a burden on religious practice," there emerges "a form of nondiscrimination right, triggered by a burden that is not neutral or not generally applicable." *Id.* This trend has key implications for resolving Trinity Lutheran's case.

Financial aid to religious entities has often been viewed with suspicion. In spite of affirmative First Amendment protection for religion, courts have hesitated to approve anything but remote, incidental, indirect, inconsequential benefits. *Lynch v. Donnelly,* 465 U.S. 668, 683 (1984); *Widmar v. Vincent,* 454 U.S. 263, 273-274 (1981); *Comm. for Public Educ. v. Nyquist,* 413 U.S. 756, 771 (1973). There seems to be a pervasive paranoia that somehow, somewhere, someone might inadvertently confer a slight benefit on religion. But under this Court's current approach, that anxiety is misplaced.

Providing safe playgrounds for children is an eminently neutral benefit far removed from "[t]he coercion that was a hallmark of historical establishments... coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Van Orden v. Perry,* 545 U.S. 677, 693 (2005) (Thomas, J., concurring), citing *Lee v. Weisman,* 505 U.S. 577, 640 (1992) (Scalia, J., dissenting). That historical threat is what drove the outcome in *Locke v. Davey*—quite unlike the Scrap Tire Program. Missouri has categorically excluded churches from participation, relying on constitutionally questionable provisions in its state constitution.

As this Court's jurisprudence shifted from a rigid denial of government aid to a more flexible nondiscrimination approach, cases were typically Establishment Clause challenges about what the state was *permitted* to do rather than what it was *required* to do. But the result has been less than satisfactory:

> The Court struggled for decades to find a middle ground that would permit some funding for religious institutions but not too much. *Its new middle ground is to permit most funding but to require hardly any*. This position maximizes government discretion and judicial deference, but it threatens religious liberty. The Court has quite possibly come to the worst solution for religious liberty, maximizing government power over religious institutions.

Laycock, *Theology Scholarships,* 118 Harv. L. Rev. at 161 (emphasis added). This case is an opportunity to extend nondiscrimination principles so that religious entities are granted equal access to neutral, generally available benefits.

In light of this Court's developing jurisprudence, states have crafted programs to comply with existing Establishment Clause jurisprudence. The scholarship program at issue in *Colorado Christian University* reflects such efforts:

> The legislative history suggests that the legislature designed these statutes to make funds available as broadly as was thought permissible under the Supreme Court's then-existing Establishment Clause doctrine.

Colorado Christian University v. Weaver, 534 F.3d 1245, 1251 (10th Cir. 2008). In 1977, when Colorado adopted the relevant provisions, this Court had "struck down in their entirety state statutes that contained insufficient safeguards against the direct funding of pervasively sectarian institutions." *Id.* at 1245; *see, e.g.*, *Roemer v. Bd. of Pub. Works,* 426 U.S. 736, 755 (1976) ("no state aid at all [may] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones," citing *Hunt v. McNair,* 413 U.S. 734 (1973)). This Court has subsequently modified its approach and discarded the absolute prohibition of funding for "pervasively sectarian" institutions. *Colorado Christian University*, 534 F.3d at 1251-52, 1258. Indeed, "the application of the 'pervasively sectarian' factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Id.* at 1258, quoting *Mitchell v. Helms,* 530 U.S. 793, 828 (2000). Here, Missouri's approach collides with this Court's trend toward nondiscrimination principles in public funding cases.

Early history (pre-*Lemon*). Decades ago, this Court found "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach v. Clauson,* 343 U.S. 306, 313-314 (1952). At that time, this Court began to consider state programs funding religious and secular education. Both "no aid" and nondiscrimination principles were evident in *Everson*, when this Court upheld state-funded bus rides that included a Catholic high school. *Everson v. Board of*

Education, 330 U.S. 1. The Court concluded that New Jersey could not exclude individuals of a particular faith from receiving the benefits of public welfare legislation (*id.* at 16), essentially applying a "weak form of the nondiscrimination principle" that "permitted equal funding, but did not require it." Laycock, *Theology Scholarships,* 118 Harv. L. Rev. at 164. At this point, "[f]ew judges took seriously the possibility that equal funding might be constitutionally required." *Id.* But the decision was far from unanimous. Four dissenting justices advocated the rigid no aid position that later prevailed for a long stretch, insisting the Establishment Clause "broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes." *Everson*, 330 U.S. at 33 (JJ. Rutledge, Frankfurter, Jackson, Burton, dissenting).

Everson involved bus transportation, a religiously neutral benefit that hardly raised establishment concerns. A few years later, this Court approved a state program loaning textbooks to children in both public and parochial schools. Building on *Everson*, the Court found this program did not advance religion, but furthered educational opportunities for the young. *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968). But again, a strong dissent objected:

> [T]ax-raised funds cannot constitutionally be used to support religious schools, buy their school books, erect their buildings, pay their teachers, or pay any other of their maintenance expenses, even to the extent of one penny.

Id. at 253-254 (Black, J., dissenting).

Following these early decisions, this Court "has struggled to reconcile two competing intuitions"—the rigid no aid position that prevailed from *Lemon* through the mid-1980's, and the nondiscrimination approach that later won the day. Douglas Laycock, SYMPOSIUM: Educational Choice: Emerging Legal and Policy Issues: ARTICLE: *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It's a Lot More than Just Republican Appointments*, 2008 BYU L. Rev. 275, 276 (2008).

"No Aid" Era (1971-1985). *Lemon v. Kurzman* ushered in a series of Establishment Clause challenges filed by taxpayers. *Hunt v. McNair* survived *Lemon* scrutiny because the Baptist college to be financed with state revenue bonds was not pervasively sectarian. But this era was largely dominated by a strict "no aid" policy that struck down many forms of state aid for private religious schools and their students:

- *Lemon v. Kurzman*, 403 U.S. 602
  (subsidy for private school teacher salaries)

- *Hunt v. McNair*, 413 U.S. 734
  (state revenue bonds issued for Baptist college—constitutional under *Lemon* analysis because the college was not "pervasively sectarian")

- *Meek v. Pittenger*, 421 U.S. 349 (1975)
  (instructional materials and equipment, remedial instruction, counseling, speech and hearing services to private schools; overruled in part by *Mitchell* and in part, implicitly, by *Agostini v. Felton*, 521 U.S. 203 (1997))

- *Wolman v. Walter*, 433 U.S. 229 (1977) (instructional materials, equipment, and services; overruled in part by *Mitchell*)

- *Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (enrichment courses for private school students; overruled by *Agostini*)

- *Aguilar v. Felton*, 473 U.S. 402 (1985) (aid for salaries of public school employees providing remedial instruction and guidance services to parochial school students on parochial school premises—overruled by *Agostini*)

"The no-aid principle derived from eighteenth-century debates over earmarked taxes levied exclusively for the funding of churches." Laycock, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions*, 2008 BYU L. Rev. at 276. At that time, the policy protected citizens from compelled support for religion and protected churches from financial dependence on the government. *Id.* The policy continued to dominate for many reasons, including lingering anti-Catholic sentiment that declined and ultimately faded in the 1950's and 1960's, and concerns about "white flight" to private schools in the face of desegregation mandates. *Id.* at 285-288. Eventually, a broad Protestant-Catholic coalition reframed the issue in terms of private choice and neutrality (*id.* at 292), but meanwhile, "the no-aid principle predominated from then [*Lemon*] until its high-water mark in *Aguilar v. Felton* in 1985." *Id.* at 277.

Aguilar and *Ball*, filed the same day, were both "ideological, strict constructionist attacks on programs that brought public-school teachers onto the premises of parochial schools." William W. Bassett, SYMPOSIUM: Educational Choice: Emerging Legal and Policy Issues: ARTICLE: *Changing Perceptions of Private Religious Schools: Public Money and Public Trust in the Education of Children*, 2008 BYU L. Rev. 243, 259 (2008). These rulings created "excessive costs to bus children from parochial schools to some 'neutral' premises to avoid the appearance of a church-state union." *Id.* The result was not only costly but chaotic. *Id.* at 263. The New York state legislature created a special school district to accommodate the needs of a religious group and its disabled children who had been denied relief from an injunction prohibiting them from receiving Title I services on their religious school premises. The creation of the new school district, carved out along religious lines, raised its own Establishment Clause concerns. *Id.* at 264, discussing *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994). But in *Kiryas Joel*, five of this Court's justices (Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas):

> . . . called for a new case to be filed to overrule *Aguilar*. Justice O'Connor said that the Court "should, in a proper case, be prepared to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to what I think is the proper track - government impartiality, not animosity, toward religion."

Bassett, *Changing Perceptions*, 2008 BYU L. Rev. 243 at 264 (2008), quoting *Kiryas Joel*, 512 U.S. at 717-718 (O'Connor, J., concurring).

But "[e]ven at the height of the Lemon era," this Court approved financial aid from time to time:

- Bus transportation (*Meek v. Pittenger*, 421 U.S. at 359-62)
- Standardized testing; off-premises remedial instruction (*Wolman v. Walter*, 433 U.S. at 241-244, 244-248)
- State tax deductions (*Mueller v. Allen*, 463 U.S. 388, 394-403 (1983))

Laycock, *Theology Scholarships,* 118 Harv. L. Rev. at 165-166. This Court "never squarely repudiated the nondiscrimination principle," resulting in an incoherent body of law and leaving the no-aid position "vulnerable to new Justices measuring neutrality from a different baseline." *Id.* at 166.

Around the end of the "no-aid" era, this Court decided *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986). *Witters* has several parallels to *Locke v. Davey*, the cornerstone of the Eighth Circuit's ruling against Trinity Lutheran. Petitioner was a blind student, studying to become a pastor, who applied for assistance under a vocational rehabilitation program. The State of Washington—the same state where *Locke v. Davey* originated—denied the application based on the state constitution. The Washington Supreme Court upheld the denial, but based its decision on the federal Establishment Clause rather than the state constitution. This Court reversed, finding no establishment violation.

Witters is an interesting case in this Court's transition to nondiscrimination. First, while this Court expressed "no opinion" on whether the Free Exercise Clause mandated the vocational aid petitioner sought (*Witters*, 474 U.S. at 489-490), the case was not a typical taxpayer challenge alleging an Establishment Clause violation. Instead, as in *Locke v. Davey*, it was the petition of an individual denied funding because he sought religious training. Second, this Court cited nondiscrimination principles to support its ruling: "Washington's program is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited...and is in no way skewed towards religion." *Witters*, 474 U.S. at 487-488. Finally, nondiscrimination won the day in spite of the Court's simultaneous confirmation of both the "no aid" and nondiscrimination approaches:

> It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution.... It is equally well settled, on the other hand, that the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is "that of a direct subsidy to the religious school" from the State. *Grand Rapids School District v. Ball*, 473 U.S., at 394. Aid may have that effect even though it takes the form of aid to students or parents. *Ibid.*; see, *e.g.*, *Wolman v. Walter*, 433 U.S. 229, 248-251 (1977); *Committee for Public Education and Religious Liberty* v. *Nyquist, supra; Sloan v. Lemon*, 413 U.S. 825 (1973).

Witters, 474 U.S. at 486. Amazingly, this Court applied nondiscrimination principles to Witter's claims even *before* cases like *Ball*, *Aguilar*, and *Wolman* were overruled (in part or whole). The Court noted in dicta that "[o]n remand, the state court is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution." *Id.* at 489. Nevertheless, *Witters* is an intriguing step toward nondiscrimination in funding cases. Trinity Lutheran's case is an opportunity for this Court to further sharpen the doctrine and consider whether "far stricter" state constitutions should override principles of equality and nondiscrimination.

Nondiscrimination (1986 and beyond). The tide eventually turned and this Court began to apply nondiscrimination principles to funding cases, facilitating greater equality between religious organizations and comparable secular entities.

In 1988, this Court rejected a taxpayer Establishment Clause challenge to a statutory scheme that allowed faith-based organizations to participate in funding for services related to adolescent sexual relations and pregnancy. *Bowen v. Kendrick*, 487 U.S. 589, 608 (1988) ("[N]othing on the face of the Act suggests it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution.") A few years later, several landmark cases inaugurated an era where religious and secular private schools began to enjoy equal access to funding opportunities, particularly where the services funded were unrelated to religion or private choices directed the funds. In *Zobrest*, a deaf student at a Catholic high school requested a sign-language interpreter, as

required by the Individuals With Disabilities Educational Act. The school district's refusal to provide the service was based on its fear of violating the Establishment Clause. The lower courts ruled against him but this Court reversed. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). In 1997, this Court overruled *Aguilar* and *Ball*, and implicitly overruled *Meek v. Pittinger*, rejecting a taxpayer Establishment Clause challenge to a program allowing public school teachers to provide remedial education to low-income student in both public and private schools. The program did not define recipients with reference to religion. *Agostini*, 521 U.S. at 234. Three years later, this Court expressly endorsed nondiscrimination principles and condemned hostility to religion, upholding a federally funded program distributing equipment to public and private schools on a per-student basis without reference to religion:

> If a program offers permissible aid to the religious (including the pervasively sectarian), the a-religious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be. The pervasively sectarian recipient has not received any special favor, and *it is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously*, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children.

Mitchell, 530 U.S. at 827-828 (emphasis added). As one commentator explained:

> The Establishment Clause test that emerges from *Mitchell* is articulated by the Court's derivation from *Agostini*. "Where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis ... the aid is less likely to have the effect of advancing religion," and is less likely to create a "financial incentive to undertake religious indoctrination."

Bassett, *Changing Perceptions*, 2008 BYU L. Rev. 243 at 269, citing *Mitchell*, 530 U.S. at 817; *Agostini*, 521 U.S. at 231.

Finally, in *Zelman*, this Court rejected an Establishment Clause challenge to a program that provided tuition and tutorial aid based on financial need and residence in a particular school district—not religion:

> [I]n *Zobrest*, we applied *Mueller* and *Witters* to reject an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools. Reviewing our earlier decisions, we stated that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge. Looking once again to the challenged program as a whole, we observed that the program distributes benefits neutrally

> to any child qualifying as disabled. Its primary beneficiaries...were disabled children, not sectarian schools.

Zelman v. Simmons-Harris, 536 U.S. 639, 651 (2002) (internal citations and quotation marks omitted). Similarly, the tire program benefits all children attending daycare in Missouri. *Zelman* and other cases "should be understood as evidence of [this] Court's shift from a focus on effects and perceptions to a focus on the principle that government decisions which do not utilize religion as a standard for action or inaction do not violate the Establishment Clause." Ryan A. Doringo, *Comment: Revival: Toward a Formal Neutrality Approach to Economic Development Transfers to Religious Institutions*, 46 Akron L. Rev. 763, 794 (2013).

Beginning with *Witters* in 1986, "[this] Court progressively elevated the nondiscrimination principle while subordinating the no-aid principle." Laycock, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions*, 2008 BYU L. Rev. 275 at 278. Since that time, this Court has upheld five additional programs allowing funds to reach religious institutions (*Bowen, Zobrest, Agostini, Mitchell, Zelman*), partially or wholly overruling several Lemon era rulings (*Meek, Wolman, Aguilar, Ball*). *Id.*

This Court's shift to nondiscrimination principles is also evident in other contexts, including speech and association: *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (requiring equal access to funding for religious viewpoints); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (requiring

equal access to school facilities for religious groups); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (same). In each of these cases, this Court invalidated a policy that categorically excluded religion from a generally available public benefit.

If this Court consistently continues its current trend, it should reverse the Eighth Circuit decision and require Missouri to grant equal access to the state's Scrap Tire Program.

II. THIS COURT SHOULD APPLY NONDISCRIMINATION PRINCIPLES TO THE MISSOURI SCRAP TIRE PROGRAM.

Missouri uses its rigid state constitution as a sword to discriminate against religion rather than a shield to protect it. States may grant *more* protection than the federal Constitution. But Missouri's categorical exclusion does nothing to *protect* religion—the purpose of both Religion Clauses. These clauses were "written by the descendents of people who had come to this land precisely so that they could practice their religion freely." *McCreary County v. ACLU*, 545 U.S. 844, 881 (2005).

Nondiscrimination principles promote the required government neutrality, eliminating the threat that religious entities could be denied generally available government services and benefits dispensed according to neutral criteria. Discrimination against religion stifles religious liberty rather than preserving it. As this Court once said:

> [C]utting off church schools from these services [police, fire, sewage, public highways and

> sidewalks], so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. *But such is obviously not the purpose of the First Amendment.* That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; *it does not require the state to be their adversary.* State power is no more to be used so as to handicap religions than it is to favor them.

Everson, 330 U.S. at 18 (emphasis added). Missouri has become the adversary of Trinity Lutheran Church.

A. Nondiscrimination Principles Favor Mandatory Inclusion Of Churches And Other Religious Organizations In Missouri's Scrap Tire Program.

The Eighth Circuit admitted that "Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire grant program without violating the Establishment Clause." *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 784 (8th Cir. 2015). But the issue here is whether the U.S. Constitution "*compel[s]* Missouri to provide public grant money directly to a church, contravening a long-standing state constitutional provision that is not unique to Missouri." *Id.* at 785. That would admittedly be "a logical constitutional leap in the direction the Supreme Court recently seems to be going" but "only the Supreme Court can make that leap." *Id.* at 785. In view of this Court's shift toward nondiscrimination principles, it is time to make that leap.

The shift to nondiscrimination occurred almost exclusively in Establishment Clause challenges where the question of mandatory inclusion was not in front of this Court. "*Zelman* held that a state is *entitled* to offer school vouchers that can be cashed at sectarian schools but not that it is *required* to do so." *Badger Catholic, Inc. v. Washington*, 620 F.3d 775, 779 (7th Cir. 2010). The Tenth Circuit took the next logical step in analyzing a state scholarship program. It was "undisputed that federal law [did] not *require* Colorado to discriminate" against a religious university, but the state could not constitutionally "choose to exclude pervasively sectarian institutions" from the program. *Colorado Christian University*, 534 F.3d at 1253.

In *Locke v. Davey*, this Court did allow a state to discriminate under narrow circumstances quite distinct from this case, citing "play in the joints"—"state action that is permitted by the [Establishment Clause] but not required by the [Free Exercise Clause]." *Locke*, 540 U.S. at 718. But if that phrase is read in its original context, it is apparent that Missouri's categorical exclusion is not warranted:

> The course of constitutional neutrality in this area cannot be an absolutely straight line; *rigidity could well defeat the basic purpose of these provisions*, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those

> expressly proscribed governmental acts there is room for *play in the joints productive of a benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference.

Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669 (1970) (emphasis added). Nondiscrimination promotes "benevolent neutrality." Missouri's rigid exclusion of churches is neither benevolent nor neutral.

B. Missouri Has Engaged In Blatant Discrimination Against Religion.

Both Religion Clauses of the First Amendment protect religion. It frustrates this purpose to penalize a religious institution for no other reason than the fact that it *is* a religious institution. Exclusion is the antithesis of equal protection and free exercise. Missouri violates a portion of the very constitutional provision it cites for its exclusion—that "no preference shall be given to *nor any discrimination made against* any church, sect, or creed of religion, or any form of religious faith or worship." Mo. Const. Art. I, § 7. Missouri's "arbitrary denial of a general public service" renders it an "adversary of religion." *Luetkemeyer v. Kaufmann*, 419 U.S. 888, 890 (1974) (White, J., dissenting from denial of certiorari).

Locke v. Davey does not alter this result. "*Locke* did not leave states with unfettered discretion to exclude the religious from generally available public benefits. . . . [Missouri's] blanket prohibition is different in kind from the disfavor of religion that was present in *Locke*." *Trinity Lutheran Church*, 788 F.3d at 791-791 (Gruender, J., dissenting). *Locke*'s relatively

minor burdens and mild disfavor, even if "tolerable in service of 'historical and substantial state interest[s],'" do not justify Missouri's wholesale exclusion of churches from a neutral community benefit that has nothing to do with religion. *Colorado Christian University*, 534 F.3d at 1255-56. *Locke* expressed concern about "popular uprisings against procuring taxpayer funds to support church leaders" (*Locke*, 540 U.S. at 722). Nothing remotely similar is involved here. Unlike laws that singled out religion for benefits not available to others, Missouri withholds a generally available public benefit on the sole basis of religion—violating the Constitution as surely as if it had imposed a special tax.

Missouri's policy excluding churches from the Scrap Tire Program jeopardizes the required neutrality. As the Sixth Circuit observed in upholding Detroit's downtown refurbishing program:

> That the program includes, rather than excludes, several churches among its many other recipients helps ensure neutrality, not threaten it.

Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth., 567 F.3d 278, 290 (6th Cir. 2009) (internal citations and quotation marks omitted). This Court seems to agree, noting that "[its] decisions...have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Mitchell*, 530 U.S. at 828. Missouri's discrimination against religion is comparable to the exclusion of clergy from public office this Court denounced in *McDaniel v. Paty*. There—as in this case—the state "punish[ed] a religious

profession with the privation of a civil right." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978), quoting 5 Writings of James Madison 288 (G. Hunt ed. 1904).

Moreover, Missouri discriminates against religion by imposing a burden while denying the accompanying benefits funded by that burden. The Scrap Tire Program is funded by a special tax on new tires. There is no exemption for churches, which are subject to the fee but prohibited from participation in the benefits. When the Sixth Circuit evaluated a religiously neutral program to refurbish downtown buildings and parking lots, the court noted that:

> . . .if the City may apply generally applicable public health regulations to the exterior of these buildings due to public safety concerns, the City ought to be able to help fix up their exteriors through generally applicable, neutral aid programs. What the government may regulate, as a general rule, it presumptively ought to be able to assist. It would be strange to read the Religion Clauses to say that churches may be subjected to neutral and generally applicable laws, *see Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877-82 (1990), but may not receive neutral and generally applicable benefits.

Am. Atheists, 567 F.3d at 300. The same is true here. If churches must pay the statutory fee when they purchase vehicles—as churches serving youth often do—they should be eligible for programs funded by those fees.

C. Missouri's Scrap Tire Program Serves Community Purposes Unrelated To Religion.

Missouri's constitution prohibits the use of public funds "in aid of any religious creed, church or sectarian *purpose*." Mo. Const. Art. IX, § 8 (emphasis added). This critical qualification should not be overlooked. "[S]choolchildren playing on a safer rubber surface made from environmentally-friendly recycled tires has nothing to do with religion." *Trinity Lutheran Church*, 788 F.3d at 793 (Gruender, J., dissenting). The tire program promotes child safety and environmental care. It benefits the surrounding community and not merely the children who attend the church daycare. Other cases upholding government funding reveal similarly neutral purposes. *Widmar v. Vincent,* 454 U.S. at 267 (developing social and cultural awareness; intellectual curiosity); *Am. Atheists,* 567 F.3d at 292 (downtown refurbishing program served "eminently secular objectives"); *Everson*, 330 U.S. at 6 (New Jersey legislature determined that funding bus fares for all schoolchildren would serve a public purpose); *Bd. of Educ. v. Allen*, 392 U.S. at 242 (purpose of statute requiring issuance of free preapproved textbooks, for all children in public and parochial schools, was to encourage school development—not to advance or inhibit religion). *Allen* is on the border between permissible and impermissible objectives. As the dissent pointed out, "there is nothing ideological about a bus," while "[t]he textbook goes to the very heart of education in a parochial school." *Id.* at 257 (Black, J., dissenting). Even so, this Court upheld the program. The purposes in all of these cases have value for religious schools, much like police and fire protection,

sewage facilities, streets and sidewalks. But none constitute the favoritism the Constitution prohibits.

One key to the analysis is the criteria used to select funding recipients. Trinity Lutheran's application received high ratings based on factors unrelated to its religious status. Similarly, Detroit determined eligibility for its downtown refurbishing program "in spite of, rather than because of" the religious character of applicants. *Am. Atheists*, 567 F.3d at 289. The "program allocate[d] benefits to a broad spectrum of entities on a neutral basis." *Id.* at 282. Although the First Circuit arguably erred in *Eulitt* by declining all funding for religious schools, this factor helps distinguish the result. The town of Minot, Maine opted to outsource secondary education. Its contract with a neighboring school district reserved the right to send up to 10% of its high school students to other approved secondary schools, provided they could "demonstrate that they [had] educational needs" the neighboring district could not satisfy. *Eulitt ex rel. Eulitt v. Maine Dept. of Education*, 386 F.3d 344, 346-347 (1st Cir. 2004). Several parents asserted an educational need for classes teaching Catholic doctrine, and other subjects from a Catholic viewpoint, but their requests for tuition payments were denied. Their requests were made *because of—not in spite of*—the religious character of the schools they selected for their children. The payments would have served an inherently religious purpose, and approval would not have been based on neutral criteria. Right or wrong, this ruling is readily distinguished from Trinity Lutheran's participation in the scrap tire program.

Curiously, Missouri asserts the government speech doctrine as a rationale for its categorical exclusion of churches. Opp. Pet. 5-7. Government funding decisions may send an embedded message of approval for the activities funded. "Choosing which programs to support and which not...is a form of government speech." *Badger Catholic,* 620 F.3d at 780. "[V]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001). Some cases involve programs where one of primary purposes is to transmit a government message. *See, e.g., Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 553 (2005) (federal program promoting beef consumption). In such cases, the government controls the message.

The government speech doctrine is inapplicable and offers no support for Missouri's position. The Scrap Tire Program was not established for expressive purposes. Missouri is neither transmitting its own message nor facilitating a forum to encourage a diversity of views. The state set up a program to take action – not to communicate a message, support an educational or religious program, or establish a forum for private expression. There is an implicit "message" about the value of child safety and environmental care, but the categorical exclusion of church playgrounds sends the "message" that children who play there are less worthy of protection. If the state levels the playing field and allows secular and religious applicants to participate in the program on equal terms, the message is one of neutrality—not favoritism—for religion.

D. The Missouri Constitution, Like Many Other State Constitutions, Contains Constitutionally Questionable Provisions And Cannot Withstand A Nondiscrimination Analysis.

Missouri's state constitution, examined against the backdrop of history and similar provisions adopted by other states, raises serious constitutional concerns. Many state provisions are rooted in religious bigotry, a concept that collides with the federal Religion Clauses. Concerns about the state constitution are highly relevant in view of the undisputed absence of any federal establishment concerns. Missouri has an interest in maintaining an appropriate church-state distinction so as to remain neutral toward religion. But there is hardly a compelling interest in preserving the rigid separation generated by the anti-Catholic bigotry of the nineteenth century. Missouri's categorical exclusion of churches from a neutral public benefit cannot withstand a nondiscrimination analysis.

Public schools were saturated in Protestantism during the 1800's. The unsuccessful federal Blaine Amendment was an effort to prevent public funding of "sectarian"—i.e., Catholic—private schools. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J. L. & Pub. Pol'y 551, 551-573 (2003). Comparable state amendments "surfaced in the late nineteenth century during a period of mass anti-Catholic sentiment in response to Irish-Catholic immigration." Jonathan D. Boyer, *Article: Education Tax Credits: School Choice Initiatives Capable of Surmounting Blaine*

Amendments, 43 Colum. J.L. & Soc. Probs. 117, 118 (2009). Indeed, the 1889 Enabling Act *required* new states to include Blaine provisions in their constitutions to preclude funding for "sectarian" schools. DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 573-574. And it was an "open secret that 'sectarian' was code for 'Catholic.'" *Id.* at 559, quoting *Mitchell*, 530 U.S. at 828-829. By the close of the nineteenth century, "roughly thirty states would incorporate Blaine-style amendments into their constitutions." DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 573. These provisions increase the likelihood that religious entities will be denied equal treatment and denied even the most indirect public funding. This is particularly true for schools, where strict "no aid" principles reflect "a misinterpretation of the Establishment Clause, deeply rooted in historic anti-Catholicism." Laycock, *Theology Scholarships,* 118 Harv. L. Rev. at 185.

State Blaine provisions can be viewed on a continuum, from the narrow to the broad. DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 577-588. Missouri is among states with the broadest restrictions. *Id.* at 587. "Missouri's constitution prohibits the state from giving anything in aid to support 'any religious creed, church or sectarian purpose....'" *Id.*, quoting Mo. Const., Art. IX, § 8. Such broad-sweeping prohibitions "include any type of aid to virtually every sort of religiously-controlled institution." *Id.* at 588.

State constitutions, as well as analogous state statutes, have generated lawsuits over the years. The Arizona Supreme Court, in dicta, "blasted the federal

Blaine Amendment bill for its anti-Catholicism and noted the problematic nature of applying Blaine Amendment provisions because of the difficulty in 'divorcing the amendment's language from the insidious discriminatory intent that prompted it.'" DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 583-584, quoting *Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz. 1999). In upholding a downtown renovation program that included church buildings, the Sixth Circuit criticized Michigan constitutional provisions (Mich. Const. Art. I, § 4) that "gr[ew] out of the Blaine Amendments, the product of a mid-nineteenth century political movement with no roots in the Religion Clauses of the United States Constitution." *Am. Atheists,* 567 F.3d at 301; see also DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 556-76, 588-89. In *Widmar*, as in this case, Missouri asserted a "compelling interest" in maintaining a strict church-state separation, based on both the federal and Missouri constitutions. *Widmar v. Vincent,* 454 U.S. at 270, 275. Washington's state constitution triggered the challenges in both *Witters* and *Locke*. *Witters,* 474 U.S. at 483.[2] This Court determined in *Locke* that the relevant state provision was not a Blaine Amendment (*Locke*, 540 at 723 n. 7), and declined to analyze the state constitution in *Witters* (474 U.S. at 489-490). Here, Missouri's case rests entirely on state constitutional language adopted

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[2] Wash. Const. Art. I, § 11, provides in part that "no public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment," and Wash. Const. Art. IX, § 4, provides that "[all] schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

during a time when the federal Blaine Amendment was under consideration. Pet. 28. Missouri protests that the drafters were concerned to prevent the use of public money for "religious purposes" (Opp. Pet. 11)—a hollow objection in this case, where state funds may only be used to reimburse the costs of playground renovation, a purpose unrelated to religion (Section IIC).

State Blaine Amendments violate the First Amendment guarantee of religious liberty by unlawfully discriminating against religion. DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 556. If used to invalidate a state program, "[this] Court could presumably reverse that judgment on the ground that the state Blaine Amendment, *as applied in that case*, violated the federal Constitution." Laycock, Comment, *Theology Scholarships,* 118 Harv. L. Rev. at 190 (2004) (emphasis added). Whether or not Missouri's constitutional provisions are "Blaine" provisions, they operate to produce unlawful religious discrimination. As applied to Trinity Lutheran's participation in the religiously neutral Scrap Tire Program, Missouri's constitution collides with fundamental constitutional principles. The church seeks equal access to a program open to secular institutions operating similar daycare programs for children. Equality is a principle deeply embedded in the nation's history and constitution. "[A] state cannot shield a Religion Clause violation from judicial scrutiny by hiding the violation behind its own state charter." DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 607. Unequal treatment—discrimination *against* religion—violates the First Amendment. If a state enacts a funding program to assist private educational institutions, "it would seem that the *principle of nondiscrimination* requires [it] to

extend that aid to organizations [that] identify themselves as religious." *Id.* at 608 (emphasis added). Exclusion of religious organizations merely because of their religious character "is not only offensive to fundamental principles of equality of citizenship, liberalism, and distributive justice, but also deeply offensive to the Constitution's guarantee of religious liberty." *Id.* at 613.

E. Missouri's Categorical Exclusion Fails Strict Scrutiny.

Missouri's categorical exclusion of a church—merely because it *is* a church—demands the strict scrutiny applicable to fundamental rights. "When a law discriminates against religion as such. . .it automatically will fail strict scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 579 (1993) (Blackmun and O'Connor, JJ., concurring in judgment). Religious discrimination is subject to heightened scrutiny under the Free Exercise Clause (*id.* at 546), the Establishment Clause (*Larson v. Valente,* 456 U.S. 228, 246 (1982)), and the Equal Protection Clause (*McDaniel v. Paty,* 435 U.S. 618). *See Colorado Christian University*, 534 F.3d at 1266. Religion is an "inherently suspect distinction" for purposes of equal protection. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

The Missouri Constitution does not trump the strict scrutiny required by the U.S. Constitution. Missouri has no compelling interest in preserving a rigid church-state separation that destroys the benevolent neutrality required by the Religion Clauses. The First Amendment limits a state's interest "in achieving greater separation of church and State than is already

ensured under the Establishment Clause of the Federal Constitution." *Widmar v. Vincent,* 454 U.S. at 276. *Locke* does not alter this principle and is readily distinguished. This Court described the state's interest there as "historic and substantial" (*Locke*, 540 U.S. at 725), and Washington's narrowly defined "disfavor" of religion was far milder than Missouri's categorical exclusion is in this case. *Locke*'s narrow contours do not support Missouri's categorical exclusion of churches from a neutral program promising nothing more than a safe place for children to play.

CONCLUSION

The Eighth Circuit decision should be reversed.

Respectfully submitted,

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RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC., ET AL.,
Petitioners,

v.

SARAH PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICUS CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Lambda Legal Defense and Education Fund, Inc. is the nation's oldest and largest legal organization advocating for the advancement of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and people living with HIV, through impact litigation, education, and policy advocacy. *Amicus* submits this brief in support of Respondent.[1]

Amicus has participated as party counsel or *amicus curiae* in many cases navigating issues of religious liberties and rights to equal protection and freedom from government-supported discrimination, including, *e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661 (2010); *Locke v. Davey*, 540 U.S. 712 (2004); *Catholic Charities of the Diocese of Springfield-in-Illinois v. Illinois*, No. 20166-MR-254 (Ill. Cir. Ct., Sangamon Cty. Ct. Aug. 18, 2011); and *Bellmore v. United Methodist Children's Home*, No. 2002CV56474 (Super. Ct., Fulton Cty. Ct., Ga. Nov. 6, 2003).

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

LGBT people and people living with HIV continue to experience, with disturbing regularity, religiously-based refusals of social services, medical care, employment, and educational opportunities. Religious organizations that receive government funds while providing services to the public are subject to constitutional and often statutory, regulatory, and contractual constraints on their ability to discriminate against their clients, employees, patients, students, and others. These constitutional and other constraints on the ability of government-funded organizations to discriminate are critical to ensuring that religious and other minorities, including LGBT people and those living with HIV, may enjoy equal dignity and live full and equal lives. *Amicus* submits this brief to address potential tensions in constitutional principles and interests involved in this case. *Amicus* seeks to ensure that its outcome in no way suggests a diminution of the government's responsibility and authority to safeguard against the use of government aid to support discrimination or coercion based on religion.

SUMMARY OF THE ARGUMENT

Petitioner Trinity Lutheran Church of Columbia, Inc., ("Trinity") asks this Court to hold that excluding religious schools, pursuant to Missouri's "no-aid" constitutional amendment, from direct aid as part of secular government funding programs violates the Free Exercise and Equal Protection Clauses. Such a holding—particularly in

the absence of explicit safeguards against use of government funds for religious activities or to subsidize discrimination—could impede governments from enforcing critical Establishment Clause and nondiscrimination requirements prohibiting use of government funds to aid religious activities, proselytization, coercion or discrimination.

Religious organizations that accept government funding to provide services to the public ascribe to a diversity of views and religious beliefs on areas that have been the subject of profound civil rights struggles. These organizations enjoy cherished First Amendment protections to follow their own religious views, principles, and practices—subject, however, to countervailing constitutional and legal constraints where the rights of others are at risk. An essential element of the balance our Constitution strikes demands that religious organizations receiving government support for services offered to the public not use such aid to advance religion or to discriminate.

Numerous Establishment Clause and equal protection precedents recognize the impropriety of governmental support to organizations that discriminate. *See, e.g.*, *Norwood v. Harrison*, 413 U.S. 455, 465-67 (1973) (A central principle of our constitutional order is that "the Constitution does not permit the State to aid discrimination" and "[a] State's constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination."). As Respondent argues, Missouri's exclusion of

Trinity from its scrap tire program does not violate Trinity's free exercise or equal protection rights. Were the Court nonetheless to rule to the contrary, any holding should leave no doubt that Missouri can and must still ensure that adequate safeguards prevent channeling government aid to advance religious activities or to support harmful discrimination.

ARGUMENT

I. Some Religious Organizations That Offer Services To The Public Seek to Discriminate On The Basis Of Religion And Other Grounds, And There Is Reason For Concern That The Learning Center Does As Well.

Religious organizations have supplied vital support and services to countless members of the public over the course of our nation's history. But our nation also has experienced—and erected constitutional and other bulwarks against—the misuse of government funds by religious institutions to underwrite their religious activities and discrimination on such bases as race, sex, religion, sexual orientation, and gender identity. Use of government aid to advance religion and engage in impermissible discrimination defies bedrock Establishment Clause and equal protection principles, and courts and government bodies have justifiably responded with safeguards against such abuses, including the type of "no-aid" prohibition at issue in this case. *See Norwood*, 413 U.S. at 462 ("[A]

State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance."); *see also* MO. CONST. art. I, § 7. Indeed, particular care is warranted here to ensure that, were Trinity allowed the government support it seeks, it not use that aid to engage in religious activities or to discriminate in the school environment.

Trinity's Complaint states that the Learning Center, its religious school licensed by the State of Missouri, "admits students of any sex, race, color, religion, national and ethnic origin." Petition for Writ of Certiorari Appendix ("Pet. App.") at 101a. However, there would be strong reason to interrogate further, before simply blessing grant of government aid to Trinity's Learning Center, whether it, in fact, discriminates based on religion and other grounds with respect to admissions. The Learning Center "operates as a Church ministry." Brief for Petitioner at 3, *Trinity Lutheran v. Pauley*, 136 S. Ct. 891 (2016) (No. 15-577). The Complaint acknowledges that the school teaches a "Christian worldview." Pet. App. at 101a. The Learning Center's parent handbook further specifies that the curriculum is "Christ-centered," and involves daily prayer and "Jesus Time classes" in addition to weekly chapel. *Parent Handbook*, TRINITY LUTHERAN CHILD LEARNING CTR., http://tlclckids.com/enroll/parent-handbook/ (last visited July 1, 2016), Appendix at 1a; Pet. App. at 101a. The parent handbook also encourages "parents to be faithful in the use of God's

word." *Parent Handbook*, TRINITY LUTHERAN CHILD LEARNING CTR., *supra*. Students are invited to participate in Sunday worship services, where they sing under the direction of the Jesus Time teacher.[2] The Complaint does not specify where the school's religious activities do and do not take place, and whether they occur outdoors in the areas where Trinity demands the government fund its facilities. As this Court has acknowledged, "[m]any educational institutions . . . have recognized that the process of learning occurs both formally in a classroom setting and informally outside of it." *Christian Legal Soc.*, 561 U.S. at 704 (2010) (Kennedy, J., concurring) (citation omitted).

The Learning Center's nondiscrimination policy, available in the parent handbook, pointedly excludes religion (notwithstanding the contrary assertion in Trinity's Complaint), sexual orientation, or gender identity as impermissible bases for discrimination. In fact, the Learning Center's "enrollment policy" provides:

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[2] The Learning Center also appears to prefer coreligionists in its hiring, as its handbook explains, "We believe that young children benefit from an environment in which they have significant interaction with Christian adults as role models and helpers in leading a Christian life." *Parent Handbook*, TRINITY LUTHERAN CHILD LEARNING CTR., *supra*.

> The Board of Early Childhood Education of Trinity Lutheran Church has adopted the following enrollment policy for equal opportunity for students: Trinity Lutheran Child Learning Center admits and does not discriminate [against] students on the basis of sex, race, color, national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the Learning Center.

Supra.

The omissions are unsurprising given that Trinity's parent denomination, the Lutheran Church-Missouri Synod (LCMS), holds that being lesbian, bisexual, gay, or transgender is "intrinsically sinful" and harmful to others. For example, an excerpt of LCMS "frequently asked questions" posted on the denomination's official website states: "The position of the LCMS, repeatedly affirmed, is that homophile behavior is intrinsically sinful, expressly condemned as immoral by the Scriptures." *Frequently Asked Questions: LCMS Views*, THE LUTHERAN CHURCH MISSOURI SYNOD, http://www.lcms.org/faqs/lcmsviews#homosexuality (last visited June 30, 2016).

Additionally, the LCMS has co-branded guidance for schools with the Alliance Defending Freedom, counsel for Trinity in this case. This guidance advises LCMS schools not to hire people who are either outside the schools' faith tradition or

who reject the "moral standards that come with that faith." *See, e.g.*, Megan K. Mertz, *ADF's Baylor delves into legal issues facing LCMS schools*, THE LUTHERAN CHURCH MISSOURI SYNOD NEWS AND INFORMATION (June 10, 2016), http://blogs.lcms.org/2016/legal-issues-facing-lutheran-schools. It further directs LCMS schools to make clear related "expectations for students and families." *Id.* And it directs that this guidance be followed while "not [withdrawing] from government funding programs." *Id.*

Consequently, it seems quite likely that the Learning Center would refuse to admit a child of same-sex or transgender parents, or even a child whose parents hailed from a differing religious tradition. Indeed, in an interview concerning the LCMS co-branded guidance, a lawyer for the Alliance Defending Freedom asserts expressly that LCMS schools are entitled to refuse to admit a child of same-sex couples. *See KFUO Audio: Critical issues facing Lutheran schools in today's political landscape*, Interview Part I: June 7, 2015, 16:25-19:16, THE LUTHERAN CHURCH MISSOURI SYNOD NEWS AND INFORMATION (June 9, 2016), http://blogs.lcms.org/2016/kfuo-audio-critical-issues-facing-lutheran-schools-in-todays-political-landscape.

There is thus reason for concern that the Learning Center seeks government aid that would support discrimination in its program based on sexual orientation, gender identity, and religion, and about the implications of providing state assistance to an organization engaging in such discrimination.

These concerns are particularly warranted given the unfortunate precedent in this country of government-funded religious institutions discriminating based on race, sex, religion, sexual orientation, and gender identity with respect to employment and provision of services to the public. In response to such discrimination, courts and state and federal agencies have relied on constitutional, statutory, regulatory, and contractual nondiscrimination requirements to prevent institutions receiving public funds from discriminating against members of the public. The continued enforceability of such nondiscrimination requirements remains critical to the right of every person to be free from government-sanctioned discrimination and religious coercion.

A number of such cases have arisen in the social services context. For example, in *Pedreira v. Kentucky Baptist Homes for Children, Inc.*, 579 F.3d 722 (6th Cir. 2009), taxpayer plaintiffs and a former and prospective employee of a publicly funded religious child welfare facility alleged that the facility used government aid for religious indoctrination of children in its care, and also that the facility discriminated based on sexual orientation in employment. The Sixth Circuit held that the plaintiffs stated a claim for a violation of the Establishment Clause and that the facility's discriminatory employment practices were relevant to determining whether there was such a violation.

In *Catholic Charities of the Diocese of Springfield-in-Illinois*, Catholic Charities

unsuccessfully brought suit seeking a renewed state contract to provide child welfare services in Illinois despite refusing to license same-sex couples as foster parents in accordance with state law. *Catholic Charities of the Diocese of Springfield-in-Illinois, supra*, No. 20166-MR-254 (Ill. Cir. Ct., Sangamon Cty. Ct.). Similarly, *Bellmore* involved a publicly-funded child welfare agency that discriminated against a lesbian counselor and Jewish job applicant for a psychotherapist position on the basis of religion, as well as engaging in religious proselytizing and advocating sexual orientation "conversion" efforts for gay foster care youth. *See Bellmore v. United Methodist Children's Home*, No.2002CV56474 (Super. Ct., Fulton Cty. Ct., Ga.). The case settled after the State and the agency agreed not to permit discrimination in employment or services. *See In a First-of-Its-Kind Example, Lambda Legal Announces Settlement Agreement that Lays Groundwork for Civil Rights Safeguards in Public Funding of Faith Based Organizations*, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, Inc., (Nov. 5, 2003), http://www.lambdalegal.org/news/dc_20031105_in-first-of-its-kind-example-lambda-announces-settlement.

II. The Establishment Clause Prohibits Government Aid To Sectarian Schools Absent Safeguards To Protect Against Diversion Of Such Aid For Religious Use Or To Support Discrimination.

The Establishment Clause prohibits government from providing direct aid to sectarian schools that use the funds or materials for religious purposes or engage in religious discrimination. Such aid would result in impermissible government coercion of students from differing religious traditions and is unconstitutional regardless of whether the aid is awarded as part of a neutral aid program. Consequently, if this Court were to depart from *Locke* to hold that excluding such schools from government funding programs violates their free exercise or equal protection guarantees, longstanding Establishment Clause jurisprudence and its protections against government coercion to participate in religion could be imperiled. When government provides aid to religious schools and other entities, it must do so with safeguards ensuring that these institutions neither discriminate based on religion nor use the funds to inculcate religion. Here, for example, even if Article I, § 7 of the Missouri Constitution did not exist, Missouri could provide a scrap tire grant to Trinity consistent with Establishment Clause constraints only if the grant were conditioned on the Learning Center neither using the playground for prayer or other

religious purposes nor discriminating based on religion.[3]

Justice O'Connor's concurrence in *Mitchell v. Helms*, 530 U.S. 793 (2000), stands as this Court's controlling authority on the constitutional constraints on government aid to religious institutions and activities. In *Mitchell*, four Justices joined a plurality opinion that, together with Justice O'Connor's concurrence (joined by Justice Breyer), upheld a federal program that distributed funds to state and local governmental entities. These entities used the funds to loan educational materials and equipment to public and private schools, including some parochial schools. Because the support of the concurring justices was necessary to achieve a majority, and the concurrence upheld the program on the narrowest grounds and garnered a majority of the Court (including three dissenting justices), the concurring opinion limits *Mitchell's* holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

The *Mitchell* concurrence reaffirmed the

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[3] *Amicus* agrees with the contention in the *Brief of Amici Curiae American Civil Liberties Union, et al.* that this case raises additional Establishment Clause concerns related to the unique dangers of direct cash aid to a house of worship, as opposed to a religiously affiliated institution whose mission is the provision of services to the public, such as a school, hospital, or social service provider. *Amicus* focuses here on the protections provided by the Establishment Clause against religious coercion and discrimination on the part of any religious organization receiving public aid.

longstanding principle that, even if government aid is distributed neutrally on the basis of secular criteria that neither favor nor disfavor religion, "actual diversion of government aid to religious indoctrination" or "the advancement of religion" is "constitutionally impermissible." *Mitchell* at 840; *accord id.* at 868, 884, 909 n.27 (Souter, J., dissenting, joined by Stevens & Ginsberg, JJ.). Government resources should not be used to assist "a sectarian school's religious mission" or to "advance the religious missions of the recipient schools," and government support must not be employed by recipients "to finance religious activities" or "to support their religious objectives." *Mitchell* at 840 (O'Connor, J., concurring, joined by Breyer, J.) (citation omitted).

The few decisions permitting government funding to religious schools that engage in proselytization "rested on a significant factual premise" missing both in *Mitchell* and here—namely, that the aid in each of these programs was provided directly to individual students who, in turn, made the independent choice where to put that aid to use. *Id.* at 841 (citing *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 488 (1986)); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 10, 12 (1993). Accordingly, the Court's approval of the aid in these cases relied on the fact that "[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Mitchell*, 530 U.S. at 811 (O'Connor, J., concurring), citing *Witters*,

474 U.S. at 487; *see also, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 219 (1997); *Zelman v. Simmons-Harris*, 536 U.S. 639, 652-53 (2002).

Direct government funding of a school that diverts the aid to religious use or discriminates based on religion violates two Establishment Clause principles—that government may neither advance an organization's religious mission, nor "endorse" religion. As Justice O'Connor explained, there are "special Establishment Clause dangers" raised by direct money payments to sectarian institutions, and even a per capita aid program can communicate an impermissible message of endorsement. *Mitchell*, 530 U.S. at 843 (quoting *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 842 (1995)). "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). In this way, the Establishment Clause serves the purpose of protecting minorities, because endorsing religion within a school environment discriminatorily empowers members of a majority religion and marginalizes those who are not. *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 316 (2000).

Mitchell reinforces prior precedent holding that the Establishment Clause prohibits government

from "discriminat[ing] among persons on the basis of their religious beliefs and practices." *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 590 (1989), *dicta on different issue disapproved by Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014); *accord Alvarado v. City of San Jose*, 94 F.3d 1223, 1231 (9th Cir. 1996); *Am. Jewish Cong. v. City of Beverly Hills*, 90 F.3d 379, 383 (9th Cir. 1996). Governmental aid must be "made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Mitchell*, 530 U.S. at 813 (plurality op.), 846 (O'Connor, J., concurring) (both quoting *Agostini*, 521 U.S. at 231); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) (Frankfurter, J., concurring, joined by Jackson, Rutledge, & Burton, JJ.) (Establishment Clause protects religious minorities against the feeling of exclusion or separation from the polity); *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 9-11 (1947) (Establishment Clause prevents discrimination against religious minorities).

Direct government funding to schools that either discriminate based on religion or use that aid to inculcate religion also implicates a related Establishment Clause concern—the need to protect children against government coercion to participate in religion. Governmental support of programs that benefit the public must not "give aid recipients any incentive to modify their religious beliefs or practices" or "to undertake religious indoctrination." *Agostini*, 521 U.S. at 231-32. "It is beyond dispute . . . that government may not coerce anyone to support or

participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Thus, "when state funds are used to coerce worship or prayer, the Establishment Clause has been violated." *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397, 412 (2d Cir. 2001). In *Center Twp. of Marion County. v. Coe*, 572 N.E.2d 1350, 1359-60 (Ind. App. 1991), for instance, the court held that a township violated the Establishment Clause by paying religious missions to provide shelter for the homeless, because the missions required the homeless to attend religious services in order to receive shelter.

Recognizing the impropriety of governmental aid to religious discrimination, this Court in *Norwood* cited with approval a statement by Justice White in his opinion in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), that "legislation providing assistance to any sectarian school which restricted entry on racial or religious grounds would, to that extent, be unconstitutional." *Norwood*, 413 U.S. at 465 n.7 (citing *Lemon*, 403 U.S. at 671 n.2 (White, J., concurring in part and dissenting in part)). Indeed, in cases involving substantial governmental aid to religiously-affiliated educational institutions, this Court has upheld aid only where the institutions did not discriminate on the basis of religion in admissions or employment (*see Zelman*, 536 U.S. at 645; *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 757 (1976); *Hunt v. McNair*, 413 U.S. 734, 743-44 (1973); *Tilton v. Richardson*, 403 U.S. 672, 686 (1971)), and prohibited aid directed to institutions that did discriminate. *See Comm. for Pub. Educ. & Religious*

Liberty v. Nyquist, 413 U.S. 756, 767-68 (1973); *Lemon*, 403 U.S. at 611 n.5, 617; *see also Bowen v. Kendrick*, 487 U.S. 589, 609 (1988) (explaining that in *Bradfield v. Roberts*, 175 U.S. 291, 298-99 (1899), the Court upheld federal aid to a religiously-affiliated hospital in part because there was no allegation that the hospital discriminated on the basis of religion in hiring or delivery of services.)

The Establishment Clause's nondiscrimination principle has served as the basis for numerous court decisions invalidating discriminatory conduct by religious actors receiving government funding. *See, e.g., Ams. United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 418-19, 424-25 (8th Cir. 2007) (state payments to religious prison program unconstitutional because program's religious indoctrination resulted in award of prison benefits on discriminatory basis). Similarly, in *Ams. United for Separation of Church and State v. Bubb*, 379 F. Supp. 872, 892-93 (D. Kan. 1974), a three-judge district court ruled that a college's policy of discriminating in admissions on the basis of religion was sufficient, by itself, to disqualify the college from public aid through a state tuition grant program. The Establishment Clause's protection against discrimination also stands as a bulwark against legislation that aims to facilitate discrimination by organizations that serve the general public but object on religious grounds to serving certain members. *See, e.g., Campaign for Southern Equality v. Bryant*, No. 3:16-cv-99442-CWR-LRA (S. D. Miss. filed Jun. 30, 2016) (enjoining

Mississippi law that would prohibit enforcement of nondiscrimination requirements against organizations—including those receiving government grants, or providing services to the public pursuant to government contracts—that justify such discrimination on the basis of a religious belief or moral conviction that marriage "should be recognized as the union of one man and one woman," or that a person's gender is "immutable" and determined solely by "anatomy and genetics at the time of birth.").

Indeed, numerous courts have held that publicly funded social service providers are not entitled to religious accommodations that would permit them to deliver services in a sectarian or discriminatory manner, which would violate the Establishment Clause. *Moore v. Metropolitan Human Service Dist.*, 2010 WL 3982312 (E.D. La. Oct. 8, 2010) (public employee social worker not entitled to religious accommodation after being told not to engage in Christian counseling methods or face termination; court noted that limiting her religious interactions with clients was necessary to avoid an Establishment Clause violation); *Bollenbach v. Bd. of Educ.*, 659 F. Supp. 1450, 1473 (S.D.N.Y. 1987) (rejecting as improper employer's refusal to provide comparable routes to women bus drivers in deference to religious objections of male student bus riders, holding that nondiscrimination was required in order to avoid Establishment Clause violation); *Spratt v. Kent County*, 621 F. Supp. 594, 600-02 (W.D. Mich. 1985) (county employer justified

in firing social worker for alienating clients by counseling them in a religious manner, as county wished to avoid Establishment Clause violation).

Accordingly, if this Court were to accept Trinity's invitation to declare Article I, § 7 unconstitutional as applied, an outcome *Amicus* opposes, *Amicus* respectfully requests the Court to clarify explicitly that Missouri's scrap tire funding program—and any comparable government aid program—must include appropriate safeguards to ensure that religious institution recipients neither discriminate based on religion nor use government-supported facilities for religious purposes. *See, e.g.*, *Mitchell*, 530 U.S. at 861 (O'Connor, concurring) (describing safeguards employed by federal funding program that limited aid to secular, neutral, and nonideological services, among other things); *Nyquist*, 413 U.S. at 773-74.

III. The Equal Protection Guarantee Is A Further Limitation On Government Aid To Institutions That Discriminate.

The government's responsibility likewise extends to safeguarding against the use of government aid to discriminate against historically oppressed groups. Rights to the free exercise of religion do not trump hard-won rights to be free of government-supported discrimination on such bases as race, sex, or sexual orientation, as well as religion itself. "Invidious discrimination . . . is not subject to affirmative constitutional protection when it involves

state action." *Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556, 575 (1974); *see also Norwood*, 413 U.S. at 470. The government similarly has the authority to prohibit discrimination by private actors against members of minority groups even when the discrimination is motivated by religious convictions; the government certainly is under no obligation to subsidize that discrimination.

"The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). While churches and individuals in their dealings outside the public square may, within certain bounds, be entitled to private practice of beliefs that discriminate against others, they are not entitled to government support and funding to do so. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

In the context of government subsidies, "[t]his means that any tangible state assistance, outside the generalized services government might provide . . . in common . . . with all citizens, is constitutionally prohibited if it has 'a significant tendency to facilitate, reinforce, and support private discrimination.'" *Gilmore*, 417 U.S. at 568-69 (quoting *Norwood*, 413 U.S. at 466). The state thus is constitutionally obligated not only "to steer clear" of engaging in direct discrimination, "but also of giving significant aid to institutions that practice racial or other invidious discrimination." *Norwood*, 413 U.S.

at 467. "Activities that the . . . government could not constitutionally participate in directly cannot be supported indirectly through the provision of support for other persons engaged in such activity." *Nat'l Black Police Ass'n, Inc., v. Velde*, 712 F.2d 569, 580 (D.C. Cir. 1983) (citation omitted).

In multiple contexts, over many years, this Court and lower courts have reaffirmed this fundamental check on state support of private discrimination. So, for example, in *Norwood* this Court struck down as violative of the equal protection guarantee Mississippi's textbook lending program to the extent that it provided books to private schools that practiced racial segregation. According to the Court, "[t]hat the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination." *Norwood*, 413 U.S. at 463; *see also, e.g., Gilmore*, 417 U.S. at 570-74 (requiring careful scrutiny to determine whether city's provision of playing fields to racially segregated schools constituted state involvement sufficient to violate equal protection guarantee); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (holding that government agency's lease of space in public building to private restaurant practicing racial discrimination violated equal protection guarantee).

Nor, as this Court has held, must the government provide its support merely because the recipient's discrimination is grounded on religious conviction. *See Bob Jones Univ. v. United States*, 461

U.S. 574, 580, 583 n.6 (1983) (upholding denial of tax exempt status to Christian religious school whose racially restrictive policies stemmed from beliefs that "mixing of the races" would violate Divine law).

In related contexts as well, courts have repeatedly rejected religious beliefs as insufficient justification to override countervailing equality interests in freedom from discrimination based on such traits as race, sex, and sexual orientation, whether derived from the constitutional guarantee of equal protection or from government-enacted remedial prohibitions on discrimination. Thus religious views condemning interracial relations were rejected as barriers to enforcement of nondiscrimination principles. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 3 (1967) (rejecting religious tenets against interracial marriage to justify state anti-miscegenation law); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (church firing of white clerk typist for friendship with black person based on religious objection to interracial relationships was not protected exercise of religious freedom); *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944-45 (D.S.C. 1966) (rejecting claim to free exercise of segregationist religious belief to override federal Civil Rights Act of 1964), *rev'd on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

Courts have similarly rejected exemption from sex discrimination prohibitions as a free exercise right for those holding conflicting religious beliefs.

Notwithstanding longstanding religious traditions on which such free exercise claims often were premised, courts recognized that the religious views could not be accommodated without vitiating sex discrimination protections on which women were entitled to depend. *See, e.g.*, *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990) (church-operated school could not evade obligation to pay married women fair wages by citing on religious beliefs); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (church-owned school violated antidiscrimination law by offering unequal health benefits to female employees, notwithstanding free exercise defense); *Bollenbach*, 659 F. Supp. at 1472.

These same principles apply as barriers to government support for institutions that discriminate on the basis of sexual orientation or gender identity. For much of our nation's history, lesbians, gay men, and bisexuals were unconstitutionally criminalized and "condemned as immoral by the state itself," *Obergefell*, 135 S. Ct. at 2596, fueling discrimination against them by non-government actors in such areas as "employment, family issues, and housing," *Lawrence v. Texas*, 539 U.S. 558, 582 (2013) (O'Connor, J., concurring) (citation omitted). As this Court noted last term, for some, opposition to the fundamental rights and equality of same-sex couples derives from "decent and honorable religious or philosophical premises." *Obergefell*, 135 S. Ct. at 2602. Yet when those beliefs become "enacted law and public policy, the necessary consequence is to put the imprimatur of the State

itself on an exclusion that . . . demeans and stigmatizes" same-sex couples and their families. *Id.* This, the State may not do. *See also Romer v. Evans*, 517 U.S. 620, 635 (1996) (rejecting private religious objections as justification for Colorado's constitutional amendment denying nondiscrimination protections to gay people); *see generally Christian Legal Soc.*, 561 U.S. at 699 ("Although the First Amendment may protect [a religious student group's] discriminatory practices [regarding gay people] off campus, it does not require a public university to validate or support them."). Thus, Missouri could no more provide material support to a sectarian—or non-sectarian—private school that discriminates against LGBT people than Mississippi could provide textbooks to racially segregated private schools in *Norwood*.

Just as with prohibitions against racial and sex-based discrimination, courts have repeatedly rejected religious objections by participants in the public arena to generally applicable prohibitions against sexual orientation-based discrimination, which "are well within the State's usual power to enact . . . " *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 572 (1995). *See, e.g.*, *Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th Cir. 2004) (rejecting religious accommodation claim); *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 538 (W.D. Ky. 2001) (rejecting physician's claim of religious exemption from nondiscrimination laws), *vacated on other grounds by Hyman v. City of Louisville*, 2002 WL 31780201 (6th Cir. Dec. 2, 2002); *Elane*

Photography, LLC v. Willock, 309 P.3d 53, 59, 61-68 (N.M. 2013) (rejecting photographer's claim to religious exemption); *North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct.*, 189 P.3d 959 (Cal. 2008) (rejecting physician's claim to religious exemption).

Against the backdrop of discrimination that has long "harm[ed] and humiliate[d]" not only LGBT people but also their children, *Obergefell*, 135 S. Ct. at 2601, the government has a compelling interest to ensure that when it uses its resources, it does so in a way that does not perpetuate invidious discrimination, even when premised on religious convictions.

CONCLUSION

Amicus believes that Article I § 7 of the Missouri Constitution and its application to preclude Trinity from receipt of a government grant violates neither the Free Exercise nor Equal Protection Clause. Should this Court disagree, however, *Amicus* respectfully requests that any contrary ruling, nonetheless, acknowledge governments' ongoing responsibility to offer such aid only with adequate safeguards against use of government support to advance religious indoctrination and coercion, or discrimination.

There should be no possibility that a child and her same-sex parents are fenced out of Trinity, left to gaze at a publicly funded playground they may not enter, as its use is reserved solely for children from a

preferred religious tradition as a place to play and pray. The fence belongs instead precisely where Article I, § 7 erects it: separating Church from State. "If nowhere else, in the relation between Church and State, 'good fences make good neighbors.'" *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign City*, 333 U.S. 208, 232 (1948)) (Frankfurter, J., concurring).

Respectfully submitted,

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Attorneys for Amicus Curiae
July 5, 2016

Parent Handbook

Trinity Lutheran Child Learning Center

2201 West Rollins Road, Columbia, MO 65203

Dear Parents,

Trinity Lutheran Child Learning Center, a ministry of Trinity Lutheran Church, Missouri Synod, welcomes you and your child. We are licensed by the State of Missouri, Department of Health. Our curriculum is developmentally appropriate for young children and provides a balance of teacher-child directed activities based on Creative Curriculum. Our TLCLC daily morning schedule consists of Jesus Time/chapel, music, small group time, learning centers, gym and playground time.

Various events are scheduled throughout the year such as field trips, family picnic, Children's Christmas service and "Center Sunday" when families are invited to worship with us at Trinity and the children sing under the direction of Mrs. White, our music/Jesus Time teacher.

We enroll children who are age **2 years old through prekindergarten age.**

We offer a school year and summer program with a week closed before and after summer session. Please plan to **re-enroll** your child for each of the sessions that you wish to have your child attend. JANUARY is RE-ENROLLMENT MONTH for families currently attending and their younger siblings, former families and Trinity church members.

Starting on February 1st, we will begin calling families on the waiting list to fill any open spaces.

We hope that this parent handbook answers many of your questions and that you will not hesitate to call us for any further information. (573) 445-1014 or email us at tlclc@trinity-lcms.org

God's Blessings, Gail S. Schuster, Director TLCLC

Trinity Lutheran Child Learning Center Philosophy

TLCLC is a ministry of Trinity Lutheran Church for families with young children. We believe that young children benefit from an environment in which they have significant interaction with Christian adults as role models and helpers in leading a Christian life. The Learning Center is committed to providing a learning program relevant to each child's spiritual, intellectual, physical, emotional and social growth. Our curriculum is Christ-centered in its approach to teaching developmental and academic readiness skills, concepts, and values. Prayer is an integral part of each day, as are daily "Jesus Time" classes and weekly chapel times with the pastors. The members of the staff are committed to providing an atmosphere of personal warmth and support which stems from a love of our Lord and a love for the children.

We encourage parents to be faithful in the use of God's Word and in attendance at services in God's house. Children of families who are not members of Trinity Lutheran Church are welcome to enroll at

the Learning Center. If you are looking for a church home, please contact our church office at 445-2112 to speak with a pastor.

"Love the Lord your God with all your heart and with all your soul and with all your strength. These commandments that I give you today are to be upon your hearts. Impress them on your children. Talk about them when you sit at home and when you walk along the road, when you lie down and when you get up." — *Deuteronomy 6:5-7*

"Train up a child in the way he should go, and when he is old, he will not depart from it." – *Proverbs: 22:6*

ENROLLMENT SCHEDULE

Days offered:

Tuesday/Thursday – 2 days

Monday/Wednesday/Friday – 3 days

Monday-Friday – 5 days

Times offered:

8:30-11:30 am – mornings

8:30-1:00 pm – mornings with lunch

6:30-5:30 pm – full day

Meals served:

8:00 am breakfast

Mid morning snack

11:30 am lunch

afternoon snack

ENROLLMENT POLICY

The Board of Early Childhood Education of Trinity Lutheran Church has adopted the following enrollment policy for equal opportunity for students: Trinity Lutheran Child Learning Center admits and does not discriminate students on the basis of sex, race, color, national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the Learning Center.

POLICY GUIDELINES – Tuition, Fee, and Schedules

Trinity Lutheran Child Learning Center operates as a self-supporting, educational non-profit organization, financed by tuition receipts and congregational support.

ENROLLMENT FEES

A non refundable enrollment fee of $50 (fall session) and $20 (summer session) must accompany each enrollment form. These enrollment fees will be charged for every child each session of attendance.

TUITION PAYMENTS

Tuition payments are due on the first day of each month with a 10 day grace period. Please refer to your contract for the monthly amount

due as you will not receive a monthly invoice. Any payments not received by the tenth of the month will be charged a $10 late fee, unless special arrangements are made.

If payment is not received by the last day of the month, the student will not be allowed to attend school until all fees and late charges are paid in full or special arrangements are made. Fees paid by a government agency will not be assessed a late fee.

This payment is determined by taking the cost per day times the total number of days a child is scheduled for attendance during that session. This total is then divided into nine equal payments (fall session), or two equal payments (summer session). Since the operational expenses are budgeted according to anticipated income, the full monthly tuition must be paid even if a child has been absent due to sickness or other reasons.

RETURNED CHECKS

Any check returned for insufficient funds will be assessed an additional $15 fee.

WITHDRAWALS

If it becomes necessary to withdraw your child please pick up a withdrawal form from the office. A 30 days notice is required and full tuition for that month is required to the day of withdrawal.

CONTRACT REWRITES

Parents or guardians will be allowed to change the hours/days on their contract once their child's session has begun if the days are available at that point. Such changes requiring a rewritten contract will be assessed a **$10 rewriting fee.**

DROP OFF/PICK UP Please accompany your child into the Center and to his/her room to greet the teacher and to put jackets, etc. into your child's cubby.

Please remember to sign-in and sign-out your child each day on the clipboard located on the entryway table. Per licensing, this person must be at least 18 years of age.

LATE PICK-UP

If you have an emergency and expect to be late, please call the Center at 445-1014 so we can explain this to your child.

A ***$1.00 per minute late fee will be assessed*** for children not picked up by their scheduled pick up time.

CLOSED HOLIDAYS

We follow the Columbia Public School calendar as far as being closed on holidays and in addition we are closed Good Friday. We ***are in session*** on days that CPS closes for their parent/teacher conferences, teacher meetings, workshops, etc.

SNOW DAY CLOSING

We will automatically close when Columbia Public Schools announce a snow day closing. We will notify the radio and TV stations as well, however, please don't wait to hear of these separate announcements to proceed with your morning plans.

If Columbia Public Schools call a late start or early dismissal due to hazardous weather we will keep our usual hours of operation (7:00-5:30).

HEAT DAYS–We will remain open when Columbia Public Schools announce a "heat day closing".

FIRST DAY of SCHOOL YEAR

We generally start in August on a Monday of the same week that CPS schedules their first day and then end on a Friday in MayJune close to CPS's last day of school. We will always adhere to our last day, per your tuition agreement, even if CPS adjusts their last day in the spring because of snow days.

SPECIAL NEEDS CHILD

Parents of children with special needs must be aware that TLCLC may not be able to accommodate their child. These concerns should be discussed with the director prior to enrollment.

ENROLLMENT is limited by state regulations concerning student-teacher ratios and maximum building capacity.

Preschool.....10 children per class daily

PreK.....10 children per class daily

(unless all children in one class have turned 5 years old)

REQUIRED FORMS

The following forms must be completed and turned into the Learning Center office on or prior to your child's first day of school:

___enrollment form

___information card

___parent questionnaire

___tuition contract

___sunscreen permission form

___health medical form completed by child's physician

___copy of updated immunizations including:

- VARICELLA or doctor's signature and statement of the month/year your child had chickenpox

(a new requirement as of July 1, 2010)

- Pneumococcal conjugate vaccine (PCV)

According to state licensing, a child is not allowed to attend school without these completed health forms. Each child is required to have a physical examination by a physician prior to the beginning of the school entry to TLCLC. Immunizations must be kept up-to-date; see included chart.

HEALTH AND SAFETY

Parents are responsible for the periodic examination concerning their child's health. Teachers should be informed, in writing of any medical problems a child may have, i.e. asthma, allergies, diabetes, etc

WHEN TO KEEP A CHILD AT HOME WITH HEALTH ISSUES

A child should be kept at home if, during the previous 24 hours, any of the following symptoms have been observed:

1. Sore throat, runny nose, cough or sneezing

2. Upset stomach (vomiting, diarrhea, abdominal cramps)

3. An undiagnosed rash

4. Nasal or bronchial congestion or discharge

5. Bloodshot, red swollen eyes or eyelids or discharge from eyes.

6. Head or body lice or other parasitic disease

Parents will be contacted for early pick up if their child displays any of the above symptoms. If we do request this, while we understand that it is an inconvenience to you, we appreciate your child being picked up within half an hour of notification.

If a child is sent home for any of the above illnesses, they may not return until they have been "symptom free for 24 hours".

COMMUNICABLE DISEASES

Children having communicable diseases may not attend school until the attending physician indicates returning to school is appropriate. Please notify the school immediately if a child is diagnosed as having a contagious disease such as strep, chickenpox, conjunctivitis (pink eye), lice or ringworm. Children with strep infection must be kept home 24 hours after being placed on medication, longer if advised by your physician. We are required by licensing to post notices of the above illnesses which will then alert you to be watchful concerning your child.

Concerning "cold" symptoms:

We trust that you will use good judgment when your child starts to exhibit signs of a cold. Ideally a child will benefit by staying home and resting at the onset of a cold, which might ultimately prevent further complications and in the long run requiring you to take off less time at work. Please instruct your child in the use of tissues and show him/her how to "cover a cough or sneeze". If your child is not able to do these things, please keep him home an extra day or so. Children should stay home for 24 hours after their temperature returns to normal.

Concerning a fever:

Do not send a child to school if he/she has exhibited a fever the day before or the morning of school. It is never acceptable to give a child Tylenol or other fever reducing medication in order for them to participate at school when a fever of 100 degrees and above is detected. A child with a temperature is most likely

contagious and the health of classmates should be a consideration. A child should not return to school until he/she can participate in all activities ***indoors and outdoors. All children attending are expected to go outdoors when the rest of the class plays outside on the playground.***

MEDICATION

Parents are welcome to come to the Learning Center at the time their child needs medication and to administer it themselves, however, we have a policy of not administering medication of any kind.

INJURIES

Minor to moderate scrapes, cuts and other injuries and medical problems will be handled according to standard first aid procedures. An accident report will be written and ready for the parent to sign at pick up time. ***In addition***, you will receive a phone call, per state licensing requirement, informing you of the injury to your child.

MAJOR MEDICAL EMERGENCIES will be handled by assessing the extent of the injury or medical problem and the parent will immediately be contacted. If appropriate, a medical emergency team will be summoned by dialing 911. A staff member will remain with the child until the parent/medical team arrives to assume supervision of the child. A preliminary accident report will be prepared and given to the parent upon arrival. A detailed accident report for the parents will be completed for the parent to sign and date and a copy will be

maintained as part of the child's permanent record and another copy given to the parent.

If a parent or emergency number contacts are not available, a staff member will proceed with emergency medical treatment as outline on the child's information card and authorized by the parent.

SECURITY SYSTEM All doors meet fire code regulations as far as exiting, however, we have a security system in place for entering the Learning Center. Parents are given this security door code upon enrollment of their child. This code changes at the beginning of each school year.

FIRE AND TORNADO DRILLS

We are required by licensing to do monthly fire drills and quarterly tornado drills. We are treating the tornado drill also as a practice for an in-house lock-down for other type emergencies. We do not alert the children of this concept as we do not want to cause them to feel any undue alarm.

Handbook last revised October 2014

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
APR 21 2016
OFFICE OF THE CLERK

No. 15-577

In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR, MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

AMICI BRIEF OF LAW AND RELIGION PRACTITIONERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

Amici are academics and practitioners who write and work in the field of law and religion. Our interest is in making sure that the proper balance is struck between the clauses of the First Amendment.

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[1] *Amici curiae* affirms under Rule 37.6 that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund this brief. No person, other than *amici*, made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, all parties have consented to the filing of this brief.

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SUMMARY OF ARGUMENT

Federal and state law cannot discriminate on the sole basis of religion against an otherwise "qualifying organizations" in the distribution of public grants that go towards a secular purpose. While Trinity Lutheran Church ("TLC") is undoubtedly a Christian institution with a religious mission, the Learning Center and the playground at issue in this case do not go towards advancing those interests, but instead serve the common benefit of the community in the safety of their children. This Court has made important distinctions regarding the allocation of funds that go towards advancing religion and those funds indisputably marked off from any religious functions. It is important for this Court to reaffirm its precedent that the separation of church and state requires government neutrality, neither favoring or disfavoring religion, and allow the allocation of the DNR grant for resurfacing the playground at Trinity Lutheran Church for the sake of upholding equal protection under the Fourteenth Amendment.

ARGUMENT

Federal and state governments cannot discriminate against a church, synagogue, or mosque for the sole reason that said entity is a religious body. This simple fact is rooted in much of this Court's jurisprudence. *See Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1 (1947); *Sch. Dist. of Abington Tp. v. Schempp*, 374 U.S. 203 (1963); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Van Orden v. Perry*, 545 U.S. 677 (2005).

The State of Missouri and the court below nevertheless declared that petitioner Trinity Lutheran Church (TLC) could be disqualified from assistance under an indisputably secular program (viz., for converting used automobile tires into safe playground surfacing) solely because it is a church. TLC's municipality granted its application upon deeming it a "qualifying organization," fully aware of TLC's disclosure that the Learning Center hosting the playground was part of the Church. *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 782 (8th Cir. 2015). In fact, TLC's application was ranked fifth out of 44, and the top fourteen projects were funded. *Id.* It was only after "further review" that the Department changed its mind about TLC's eligibility due to its religious affiliation. *Id.* The Department then went on to fund fourteen other projects. *Id.* We ask this Court to reverse the judgment below.

I. IT IS UNCONSTITUTIONAL TO DISCRIMINATE AGAINST A HOUSE OF WORSHIP SOLELY BECAUSE OF ITS RELIGIOUS AFFILIATION.

Express governmental discrimination against a church is generally unconstitutional. *Lynch*, 465 U.S. at 673 ("[T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."); *see also Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (holding this Court does not "find in the Constitution a requirement that the government show a callous indifference to religious groups [...] we find no constitutional requirement which makes it necessary for government to be hostile to religion . . . .").

In particular, this Court has held that "cutting off church schools from . . . services, so separate and so indisputably marked off from the religious function . . . is obviously not the purpose of the First Amendment." *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 18 (1947). A similarly nuanced reading of the First Amendment has been repeatedly stressed by Justice Breyer. *See Members of Jamestown Sch. Comm. v. Schmidt*, 699 F.2d 1, 16–17 (1st Cir. 1983) (Breyer, J., concurring in result) (noting, where benefit at issue "is support for child safety rather than support for the church," "[t]he First Amendment . . . is impartial . . ., and that impartiality implies that it not penalize parochial school students"); *Van Orden*, 545 U.S. at 698–99 (Breyer, J., concurring) ("[A]bsolutism is not only inconsistent with our national traditions . . . but

would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.").

Unlike the cases quoted above, the one at bar is not about the Establishment Clause. But it is important to note that the Religion Clauses can never be fully separated, and that the Court has "struggled to find a neutral course between [them], both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would clash with the other." *Walz v. Tax Comm'n*, 397 U.S. 664, 668–69 (1970).

Aside from these First Amendment considerations, the Equal Protection Clause requires that "all persons similarly situated . . . be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Unequal treatment can violate Equal Protection even if it was enacted without the intent to harm a particular group. *See* James G. Dwyer, *The Children We Abandon*, 74 N.C. L. Rev. 1321 (1996). The Constitution forbids even a government's mere indifference to a group's safety. *Id.* But unequal treatment is especially circumscribed when it rests on no more than "a bare desire to harm" a particular group. *Id.* at 446–47 (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). Regardless of the reason why a government denies a similarly situated group common benefits, it bears the burden of providing an adequate justification for doing so. That justification must be compelling when the denial affects fundamental rights—such as religious liberty. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (holding classifications affecting fundamental rights trigger strict scrutiny).

This Court has found that private and public schoolchildren are similarly situated and deserve equal

treatment with regards to generally applicable public services and protective measures. *Everson*, 330 U.S. at 1. In *Everson*, this Court noted that firemen and policemen act to protect the lives of children regardless of their religion. *Id.* Similarly, religion has no bearing on the provision of safety services like streets, sidewalks, and sewage facilities. *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 242 (1968). The same can be said for the program here helping students (and other neighborhood children) safely enjoy a school's playground facilities.

A reaction to the contrary is an overbroad response to an unrealistic inference of governmental favoritism toward religion. As multiple previous justices on this Court have remarked,

> [t]he First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact.

Schempp, 374 U.S. at 308 (Goldberg, J., concurring).

Justice Breyer echoed this distinction in a case involving tuition vouchers that could be used at religious schools, setting apart benefits that finance core religious functions as constitutionally suspect. Here, by contrast, the grant goes towards the common benefit of the community. TLC plans to use its grant to resurface its playgrounds for the safety of the children attending its daycare, as well as that of those neighborhood children who regularly use the

playground after hours. It is also worth noting that attendance at the daycare is not dependent on the religious identity of the children. As the 8th Circuit noted below, the Learning Center has an "open admissions policy." *Pauley*, 788 F.3d at 782. One could hardly imagine a more community-centered benefit than a playground for neighborhood children, and it would be an unconstitutional shame to deny it safety resurfacing on discriminatory grounds.

II. ALLOWING THE DNR GRANT FOR RESURFACING TLC'S PLAYGROUND WOULD MITIGATE RELIGIOUS HOSTILITY AND RESPECT EQUAL PROTECTION.

While this case is not being litigated under the Establishment Clause, precedent interpreting that provision is illuminating. *See Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("Government . . . may not be hostile to any religion or to the advocacy of no-religion . . . "). It sheds light on the constitutional policies behind the prohibition on government hostility toward religion. It shows why the two rationales relied upon by the court below—unjustifiable fears of a playground resurfacing grant having religious objectives, and a supposed safe haven from a state having to allow religious schools equal access to common benefits—are unacceptable as a matter of law. *See Pauley*, 788 F.3d at 783–84.

A. *The fear of subsidizing religious institutions does not excuse unbalancing peaceful coexistence between government and religion.*

The constitutional prohibition on government hostility against religion requires allowing the DNR grant to fund playground resurfacing at the Learning Center. The need for the government and religion to coexist without a trace of mutual hostility and suspicion towards one another found voice in Justice Breyer's concurrence in *Van Orden v. Perry*, when he wrote that the Religion Clauses

> seek to "assure the fullest possible scope of religious liberty and tolerance for all" . . . They seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike . . . They seek to maintain that "separation of church and state" that has long been critical to the "peaceful dominion that religion exercises in [this] country," where the "spirit of religion" and the "spirit of freedom" are productively "united," "reign[ing] together" but in separate spheres "on the same soil."

545 U.S. at 698 (internal citations omitted). He also stressed the importance of maintaining social cohesion by avoiding absolute separation through the purging of religion from the public sphere. *Id.* at 698–99.

These concepts are all necessary considerations for this Court as it seeks to strike the right balance regarding access to government aid programs by religious organizations.

The right balance here favors equal access to the DNR grant for TLC. The DNR grant at issue has at least (to say the very least) as secular a purpose as did the Ten Commandments monument at issue in *Van Orden*. While TLC no doubt has a religious mission that encompasses the Learning Center, the grant will not go towards advancing religion. It will further the very secular purpose of ensuring safety for children. The First Amendment does not prohibit neutral programs that carry none of the dangers of favoring religion or causing divisiveness. The threat exuded by a playground resurfacing grant is nothing more than a "mere shadow." *Id.* at 704.

B. *Prior government aid cases require a balanced approach, not a walling off of common benefits from religious organizations' reach.*

The Eighth Circuit's opinion below cites to *Locke v. Davey* for the proposition that there is "play within the joints" between Free Exercise and Establishment, such that even though Missouri is not required to remove TLC from its funding scheme, it must still be allowed to do.

This is wrong. *Locke* did not allow for play within the joints when such play would have been clearly hostile towards religion. The *Locke* Court took care to note the solicitousness toward religion of the state constitution in that case. "We have found nothing," the *Locke* Court concluded, "in [that state's] overall approach that indicates it 'single[s] out' anyone 'for special burdens on the basis of . . . religious calling,'. . . ." *Locke v. Davey*, 540 U.S. 712, 725 (2004). Contrast this approach with Missouri's, as noted by the court below. *Pauley*, 788 F 3d at 783 (noting "a long

history of maintaining a very high wall between church and state").

The Eighth Circuit's interpretation eschewed the nuance of Locke for broad strokes. It characterized TLC's argument as the equivalent of requests of direct "public funds to a church." *Id.* It paid short shrift to cases where a neutral government program incidentally benefits religion. *See, e.g. Everson*, 330 U.S. at 17 (acknowledging that a public transportation subsidy program might help get some children to church who may otherwise not attend if parents had to pay); *see also Members of Jamestown Sch. Comm. v. Schmidt*, 699 F.2d 1, 16 (1st Cir. 1983) (Breyer, J., concurring) (holding Establishment Clause does not forbid a neutral transportation statute because of a theoretical possibility it could later "lead to disproportionately large expenditures favoring religious institutions").

Justice Breyer noted the difference between these two jurisprudential lines while concurring in a First and Fourteenth Amendment challenge to Rhode Island's statute "providing bus transportation to nonpublic school children beyond school district limits." *Schmidt*, 699 F.2d at 3. He looked to the spirit of Everson that announced that a law allowing for the transportation of children promotes "the welfare of the general public" and is not "designed to support institutions which teach religion." *Id.* at 13 (Breyer, J., concurring) (quoting *Everson*, 330 U.S. 1, 14 (1947)). He concluded that "proportionate state expenditure on school transportation is support for child safety rather than support for the church." *Id.* at 16 (citing *Everson*, 330 U.S. at 18).

He again picked up this reasoning in his dissenting opinion in *Zelman v. Simmons-Harris*, approving of neutral government grants to religion as a way of protecting the "Nation's social fabric from religious conflict." 536 U.S. 639, 718 (2002).

The pot of religious strife was only stirred further, in a culture growing more impatient with religious liberty claims, by Missouri's stipulation that government aid may **never** go to a religious organization.

The harmonious balance that this Court should strike is that while aid programs go towards financing core religious functions are improper, other forms of assistance are permitted when they hold "significantly less potential for social division." *Id.* at 726–27. In this case, the DNR grant would only support the safety of children on a playground and not TLC's religious mission. Granting it is thus the best way of furthering the neutrality required time and again by this Court. *See Epperson*, 393 U.S. at 104 ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion"); *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973) ("[O]ur cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' or 'inhibiting' religion"); *Lynch*, 465 U.S. at 673 (keeping in mind that an "untutored devotion to the concept of neutrality" must not lead to "a brooding and pervasive devotion to the secular"); *Schempp*, 374 U.S. at 306 (1963) (Goldberg, J., concurring); *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014); *Brandon v. Bd. of Ed. of Guilderland Cent. Sch. Dist.*, 635 F.2d 971, 975 (2d Cir. 1980) ("Separation is meant

to foster voluntarism and neutrality, and also to preserve the integrity of both religion and government . . . .").

Missouri has undeniably tipped the scale between favoring and disfavoring religion towards the latter in violation of the First Amendment. The decision below must be reversed and balance restored.

CONCLUSION

Opponents will argue that money is fungible, and that any support given to playground safety frees up funds to further religion down the line. This Court has rejected that argument in allowing for safe busing to private religious schools and coverage by public firefighters. This case is analogous. When children come to play, the state's secularist scruples must give way.

For all of these reasons, this Court should reverse the judgment of the Eighth Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE*, LEGAL AND RELIGIOUS HISTORIANS, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are legal and religious historians and constitutional scholars who have studied, taught, and written in the areas of constitutional and religious history and the First Amendment. Many have substantial expertise on the time period and events discussed in this brief. *Amici* file this brief in support of Respondent Director Pauley and in response to arguments raised by Petitioner Trinity Lutheran Church and supporting *amici* concerning an alleged historical anti-religious basis for Article I, § 7 of the Missouri Constitution. *Amici* have a professional interest in the proper disposition of this issue and believe that the Court should decide the case on a complete and accurate historical account.

Amici are listed with their institution for identification only:

Nina J. Crimm, J.D., L.L.M., Professor of Law, and Frank H. Granito, Jr., Faculty Scholar (Retired), St. John's University School of Law;

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[1] Pursuant to this Court's Sup. Ct. R. 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. The Clerk of this Court has noted on the docket the blanket consent of the Petitioner and Respondent to the filing of *amicus* briefs.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Trinity Lutheran challenges the legitimacy of Article I, § 7 of the Missouri Constitution ("Article I, § 7" or "the Article"), alleging the Article arose from pervasive anti-Catholic animus. No evidence suggests that Article I, § 7—or the majority of state no-funding provisions that preceded it—were enacted out of anti-Catholic or anti-religious animus. Regarding the Blaine Amendment of 1876, the historical record reveals numerous rationales for that proposal, with

anti-Catholicism being only a minor one. Finally, there is no connection between Article I, § 7 and the Blaine Amendment, as the former was drafted months before the latter.

ARGUMENT

I. The Court Should Rely Cautiously on History, With an Appreciation for Complexity.

For the first time on appeal, Trinity Lutheran argues that Article I, § 7 shares a supposed "credible connection" with the historic Blaine Amendment.[2] *See Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004) ("Neither Davey nor amici have established a credible connection between the Blaine Amendment and . . . the relevant constitutional provision."). While Director Pauley's merits brief discussed the Blaine Amendment, Trinity Lutheran omitted the historic argument even while simultaneously highlighting *Locke* repeatedly. The historicity argument is waived.

Nonetheless, *amici* wish to set the historical record straight, lest an inaccurate version of that history find its way into the legal record. Trinity Lutheran asserts that enforcing Article I, § 7 violates its rights to free exercise of religion and equal protection of the laws.

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[2] Trinity Lutheran has challenged the application of Article I, § 7 as infringing on its free exercise and equal protection rights. Trinity Lutheran does not challenge Article IX, § 8, the second no-funding provision in the Missouri Constitution. Similarly, the Eighth Circuit ruled only on Article I, § 7. *See Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779 (8th Cir. 2015). However, the Eighth Circuit majority also discussed Article IX, § 8, and several *amici* have raised arguments against the constitutionality of both no-funding provisions, seeing them as evincing the same discriminatory intent. *See id.* at 783, 787; *see also* Br. for Institute for Justice 23; Br. for The Union of Orthodox Jewish Congregations of America 5, 19.

Pet'r's Br. 11, 22. In *Locke*, this Court allowed Washington to rely on a similar constitutional no-funding provision to deny a state education grant applicant from applying those monies toward a religious training program.[3] *See Locke*, 540 U.S. at 719–24. Acknowledging legitimate reasons for the Washington provision—which the Washington Supreme Court noted affords "far stricter [protection] than the more generalized prohibition of the first amendment to the United States Constitution," *Weiss v. Bruno*, 509 P.2d 973, 978 (Wash. 1973)—the Court upheld the state's action against Davey's free exercise and equal protection claims. *Locke*, 540 U.S. at 722, 724.

Trinity Lutheran asserts the *Locke* holding's corollary. If the rationales behind Article I, § 7 were illegitimate or corrupted by allegedly bigoted history, then Trinity Lutheran's free exercise and equal protection claims should prevail. The history does not support any such conclusion about illegitimacy or corruption.

This Court should view simplified historical narratives with caution. The bulk of commentary concerning the Blaine Amendment and the development of the no-funding principle has cast a net that is wide in criticism, but not deep in analysis.

History is "complex," and serves as a poor resource for drawing legal conclusions. John Fea, *Was America Founded as a Christian Nation?* (2011). Legal analysis

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[3] This Court permitted the denial even though such use would have been permissible pursuant to the Establishment Clause of the United States Constitution as a result of *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986).

and historical methodology use different processes and ask different questions. The law desires certainty; history seeks understanding human complexity. *See* David Hackett Fischer, *Historians' Fallacies: Toward a Logic of Historical Thought* 4–5 (1970); Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 602 (1995); Charles A. Miller, *The Supreme Court and the Uses of History* 195 (1969). In the words of Mark DeWolf Howe: "The complexities of history deserve our respect." Mark DeWolf Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* 176 (1965).

The same caution should apply to Trinity Lutheran's oversimplification of the no-funding provisions' histories. The no-funding principle, based on notions of religious liberty and freedom of conscience, arose prior to the rise of significant Catholic parochial schooling and independently of the nativist anti-Catholic movement. Specifically, no evidence ties Missouri's no-funding provisions to anti-Catholic motivations.

II. The No-Funding Principle Arose Independently of Anti-Religious Animus.

The no-funding principle developed in conjunction with the rise of common schools in the early nineteenth century. During the nation's founding, public education was practically nonexistent. *See* Carl Kaestle, *Pillars of the Republic: Common Schools and American Society* 13–29 (1983); David Nasaw, *Schooled to Order: A Social History of Public Schooling in the United States* 30, 34 (1979). Following the Revolution, early educational reformers such as Benjamin Franklin, Thomas Jefferson, Benjamin Rush, and Noah Webster agitated for universal public schooling, believing childhood education indispensable to the new republic's stability. *See* Noah Webster,

On Education of Youth in America, *in* ESSAYS ON EDUCATION IN THE EARLY REPUBLIC 65–66 (Frederick Rudolph ed., 1965). The early education advocates insisted schooling be moral but nonsectarian for two reasons. Steven K. Green, *The Bible, the School, and the Constitution: The Clash That Shaped Modern Church-State Doctrine* 13–16 (2012). First, proponents wanted the common schools to appeal to the largest number of children and parents. *Id.* Second, advocates wanted to avoid sectarian emphases which they believed caused religious divisiveness rather than promoting cultural unity. *Id.* Early schools thus used a nonsectarian curriculum and avoided religious differences by teaching "universal" Christian values. *See* Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J. L. & POL. 65, 74 (2002).

Common schools supported by tax revenues gradually replaced most existing Protestant denominational schools. Green, *supra*, *The Bible, the School, and the Constitution*, at 13–44. Advocates then pressured state legislatures to reserve state "school funds" for these new public schools. *Id.* Connecticut created one early fund, enacting a constitutional provision that prohibited school fund monies from "divert[ing] to any other use than the encouragement and support of public, or common schools . . . ." Conn. Const. of 1818, art. VIII, § 2.

Similarly, in New York, where early law authorized cities and towns to distribute the school funds, the initial battles over school funding arose between Protestant denominational schools and the Free School Society (soon renamed the Public School Society). Green, *supra*, *The Bible, the School, and the Constitution*, at 45–92. In 1824 and 1830, the Free School Society objected to petitions from a Baptist

school and a Methodist school, respectively, to share in the city's allotment from the state school fund. *Id.* at 52–54. In both instances, the Society argued that public funds should be reserved for common schools. *Id.* Diverting funds for religious schooling would cause competition and rivalry among faiths while also "impos[ing] a direct tax on our citizens for the support of religion." *Id.* at 48. In each case, the New York City Common Council agreed, opining that "to raise a fund by taxation, for the support of a particular sect, or every sect of Christians . . . would unhesitatingly be declared an infringement of the Constitution, and a violation of our chartered rights." *Id.* at 51. The Council could not "perceive any marked difference in principle, whether a fund be raised for the support of a particular church, or whether it be raised for the support of a school in which the doctrines of that church are taught as a part of the system of education." William Oland Bourne, *History of the Public School Society of the City of New York* 49–55, 70–75, 139–40 (1870); *see also* John Webb Pratt, *Religion, Politics, and Diversity: The Church-State Theme in New York History* 158–203 (1967); Diane Ravitch, *The Great School Wars: New York City, 1805–1973* 3–76 (1974).

These early actions limiting public school funds to common schools arose before either the first significant wave of Irish Catholic immigration or the systematic establishment of Catholic parochial schooling.[4] Ray Allen Billington, *The Protestant Crusade,*

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[4] The New York Legislature later rejected a petition from Bishop John Hughes for a share of the public school fund for Catholic parochial schools. The Legislature enacted a law prohibiting public funds to any school where "religious sectarian doctrine or tenet shall be taught, inculcated, or practiced." Green,

1800–1860 35–37 (1938); Peter Guilday, *The National Pastorals of the American Hierarchy, 1792–1919* 191 (1923).[5] Thus, many locales established the no-funding principle before the first true controversies arose over Catholic school funding.

III. The Blaine Amendment Arose From a Variety of Motivations, of Which Anti-Catholicism was Only One Factor.

Members of this Court have questioned the legitimacy of the federal no-funding principle and corresponding state constitutional principles based on alleged anti-Catholic origins. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). Scholars and advocates have raised similar claims. The chief villain has long been the Blaine Amendment, proposed at a time of heightened tensions between Protestants, Catholics, and secularists. *See* Joseph P. Viteritti, *Choosing Equality: School Choice, the Constitution, and Civil Society* 18 (1999); *see also* Philip Hamburger, *Separation of Church and State* 335 (2002). If passed, the Blaine Amendment would have expressly applied the Religion Clauses to the states and prohibited the public funding of any private religious school by any

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supra, *The Bible, the School, and the Constitution*, at 67. Although the 1842 law may have responded to the Catholic petition, the no-funding principle had already been established in New York for 20 years. Bourne, *supra*, at 496–525; Pratt, *supra*, at 178–90; Ravitch, *supra*, at 46–76; Green, *supra*, *The Bible, the School, and the Constitution*, at 54–68.

[5] Although the Catholic Bishops emphasized the importance of religious education in earlier Pastoral Letters, not until the Pastoral Letter of 1852 did they call for "the establishment and support of Catholic schools; make every sacrifice which may be necessary for this object . . . ." Guilday, *supra*, at 191.

state entity. Ward M. McAfee, *Religion, Race and Reconstruction* 208 (1998).

Opponents malign the 1876 Blaine Amendment as an unfortunate episode in Catholic bigotry. *See Mitchell*, 530 U.S. at 828–29; *see also* Charles L. Glenn, Jr., *The Myth of the Common School* 252–54 (1988); Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 145–47 (1996). Although anti-Catholic animus may have motivated some supporters, this is an incomplete account. The Blaine Amendment was the culmination of eight years of heightened conflict over the "School Question." McAfee, *supra*, at 105–24. After the Civil War, the School Question focused on more than parochial school funding; the issue was part of a larger controversy over the federal government's role in public education. The debate centered on three points: (1) whether education should be universal for all social and economic classes and races (including the children of recently freed slaves); (2) how to ensure the financial security of the bourgeoning public education system; and (3) whether the education should be secular, nonsectarian, or more religious. *Id.* The battle lines were not drawn solely between Catholics and nativists. The debate also engaged liberal Protestants, free-thinkers, and Jews who opposed the religious exercises and the nonsectarian character of the nation's schools; conservative Protestants who sought to preserve or increase the Protestant character of public schools; education and civil rights reformers who sought a larger government role in funding and regulating public education; Democratic and Republican partisans who had little interest in education issues, but viewed Catholics as a voting block; and state-rights advocates who saw no

government role in education. Green, *supra*, *The Bible, the School, and the Constitution*, at 179–223.

The impetus for the Blaine Amendment came from a controversy over an 1869 Cincinnati school board decision abolishing daily prayer and Bible readings. Although initially enjoined by a trial court, a unanimous Ohio Supreme Court upheld the Board's action. *Board of Education v. Minor*, 23 Ohio St. 211, 254 (1872). Closely followed throughout the country, the Cincinnati "Bible War" reignited a debate over the religious character of public schooling. Following the Cincinnati case, the New York and Chicago city school boards prohibited Bible reading and religious instruction in their respective schools, with Michigan and other northern states adopting similar bans. *The Bible in Schools*, N.Y. Times, Dec. 9, 1872, at 8. The *New York Tribune* opined in 1875 that the "School Question" "excites sharp controversy" and was threatening "the very existence of the republic . . . . Sooner or later the broad question must be met, 'Whether popular education belongs to the State or the churches.'" *A Coming Struggle*, N.Y. Tribune, July 8, 1874, at 4.

From this climate, President Ulysses Grant (and ultimately Representative James G. Blaine) proposed amending the Constitution to settle the School Question. As introduced by Blaine, the amendment sought to achieve two things: (1) apply the First Amendment directly to state actions; and (2) prohibit the allocation of public school funds or other public resources to religious institutions. Grant's proposal, as represented in his annual message to Congress on December 7, 1875, more broadly would have required

states to fund free public schools. McAfee, *supra*, at 4–5, 15–21, 105–24.[6]

Certainly, many observers viewed the amendment as crass political maneuvering designed to appeal to anti-Catholic voters. Others saw opportunity to resolve the larger School Question while avoiding religious strife. Both the Republican *New York Times* and the Democratic *New York Tribune* supported Blaine's proposal as a way of defusing the religious issue. *Reading the Message*, N.Y. Times, Dec. 8, 1875, at 6; *Editorial*, N.Y. Times, Dec. 15, 1875, at 6; *The Message*, N.Y. Tribune, Dec. 8, 1875, at 6; *The News This Morning*, N.Y. Tribune, Dec. 15, 1875, at 4 ("Thinking men of all parties see much more to deplore than to rejoice over, in the virulent outbreak of discussions concerning the churches and the schools, and welcome any means of removing the dangerous question from politics as speedily as possible."). The nation's leading religious journal, *The Independent*, also noted the School Question's complexity, insisting that the funding issue "bring[s] to the surface the whole subject of Church and State, civil government and religion, in their relations to each other."[7] Samuel

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[6] "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, not any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations." 4 CONG. REC. 205 (1875).

[7] According to *The Independent*, the School Question involved more than the issue of parochial school funding, but also included issues of federal control over public education and whether public schools would retain their Protestant nonsectarian character;

T. Spear, *Religion and the State, or The Bible and the Public Schools* 24 (1876). Significantly, New York Senator Francis Kernan, a Catholic, voiced his support for Blaine's original proposal.[8] 4 CONG. REC. 5453, 5580 (1876).

Therefore, a combination of at least three distinct issues—whether public schooling should be secular or religious; whether the national government should mandate schooling at the state or local levels; and how best to defuse religious strife—fueled the debate surrounding the Blaine Amendment. Despite inflamed rhetoric, most observers viewed the controversy in broader terms about the American educational system's future.[9] Courts should thus view the Blaine Amendment within this larger controversy.

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would become more Protestant in their practices; or would become "purely secular." Spear, *supra*, at 17–18, 21–22, 44–66.

[8] Kernan stated that Blaine's proposal

> met with no considerable opposition in any quarter. It declares that money raised in a State by taxation for the support of public schools or derived from any public land therefor or any public lands devoted thereto shall not be under the control of any religious sect or denomination, nor shall any money so raised by divided among the sects or religious denominations. *Were this before the Senate I would support it.*

4 Cong. Rec. 5453–5580 (emphasis added).

[9] Senate debates reflect the sheer magnitude of issues surrounding the issue: debates centered on federalism, the states' rights to control education, the financial security and religious character of public schools, the partisan nature of the amendment and, finally, the proposed ban on parochial school funding. *See* 4 CONG. REC. 5580–95 (1876).

IV. There Is No Evidence That Anti-Catholicism Played a Significant Role in the Development of Many Early State Constitutions.

Critics argue many early no-funding provisions arose primarily out of a pervasive anti-Catholic animus and the influence of antebellum nativist groups. While nineteenth century nativist groups such as the Know-Nothing Party supported nonsectarian public education and opposed the funding of parochial schools, scholars agree that Know-Nothings were relatively ineffective in enacting anti-Catholic legislation whenever they were in power. Billington, *supra*, at 412–17; *see* John R. Mulkern, *The Know-Nothing Party in Massachusetts* 102–03 (1990); Lloyd P. Jorgenson, *The State and the Non-Public School* 87–89, 96–97 (1987). Even then, anti-Catholicism cannot explain the basis for no-funding provisions in parts of the country with no significant religious dissension or nativist activity. Michigan adopted the first express no-funding provision even though the state lacked a significant number of Catholic parochial schools and preceded the wave of Catholic immigration.[10] Mich. Const. of 1835, art. I, § 5; *see* Thomas M. Cooley, *Michigan: A History of Governments* 306–29 (8th ed., 1897). The Michigan Constitution served as the model for similar constitutional provisions in Wisconsin (1848), Wis. Const. art. I, § 18; Indiana (1851), Ind. Const. art. I, § 6; Ohio (1851); Ohio Const. art. VI, § 2; and Minnesota (1857), Minn. Const. art. I, § 16—all states without significant conflicts over parochial

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[10] Apparently, Catholic and Presbyterian clergy were instrumental in the movement to establish universal nonsectarian schooling at both the collegiate and common school levels. Cooley, *supra*, at 309–11.

school funding. Separate studies of both Indiana and Wisconsin indicate there was "no evidence that the lawmakers and constitution makers were anti-religious in making the [no-funding] requirements, or that they harbored a prejudice against any sect." Alice E. Smith, *The History of Wisconsin I* 588–93 (1985); Richard N. Current, *The History of Wisconsin II* 162–69 (1976); *see* Joseph A. Ranney, *"Absolute Common Ground": The Four Eras of Assimilation in Wisconsin Education Law*, 1998 WIS. L. REV. 791, 793, 796–97 (1998) (placing the development of the parochial school systems after the enactment of the 1848 Constitution).[11] The Indiana Constitution served as the basis for a similar provision in Oregon. *See* Or. Const. art. I, § 5; *see also The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* 302 (Charles Henry Clay ed., 1926). The debates during the Oregon convention do not contain statements hostile to Catholicism. One Oregon delegate articulated his understanding of the constitutional basis for the no-funding provision, stating he did not:

> believe that congress had any right to take the public money, contributed by the people, of all creeds and faith [sic], to pay for religious teachings. It was a violent stretch of power,

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[11] The no-funding provision was not "a remnant of nineteenth century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had a particular disdain for Catholics." Barclay Thomas Johnson, *Credit Crisis to Education Emergency: The Constitutionality of Model Student Voucher Programs Under the Indiana Constitution*, 35 IND. L. REV. 173, 203 (2001). Even Professor Jorgenson, a critic of the common school movement, documented no Catholic animus in his study of the creation of the Wisconsin public education system. *See* Lloyd P. Jorgenson, *The Founding of Public Education in Wisconsin* 68–93 (1956).

> and an unauthorized one. A man in this country had a right to be a Methodist, Baptist, Roman Catholic, or what else he chose, but no government had the moral right to tax all of these creeds and classes to inculcate directly or indirectly the tenets of any one of them.

Id. at 305 (statement of Mr. Williams).

Similarly, the Catholic Church and Cincinnati public school officials had amicable relations prior to the 1851 constitutional amendment. The *Catholic Telegraph* praised the tolerance and "liberality which characterize[d] the Cincinnati [School] Board" and its policies. *Editorial*, Catholic Telegraph, Sept. 3, 1840, at 288. The Ohio Constitution served as the model for the no-funding provision of the Kansas Constitution. Kan. Const. art VI, § 6(c).

Critics somewhat inaccurately credit the Blaine Amendment as the model for twenty–one state constitution no-funding provisions over the next thirty–five years. *See generally* Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295 (2008) (demonstrating that the momentum propelling the enactment of no-funding provisions preceded the Blaine Amendment, such that states would likely have adopted such provisions irrespective of the events at the national level). The 1870s witnessed multiple proposals for an education-related constitutional amendment, most of which arose from causes other than Catholic animus—and any of which may have influenced subsequent provisions. *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL. HIST. 38, 47–55 (1992) (discussing the various competing proposals); Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice,*

and Charitable Choice, 83 DENV. U. L. REV. 57, 66–69 (2005).

No-funding principles arose as a result of a complex dynamic of forces intersecting over the issue of American public schooling. Both supporters and opponents were motivated by concerns about universal free public education, protecting the integrity of public school funding, the obligation of states to provide universal education, the federal role in ensuring and funding education at the state level, and the funding of religious instruction and training. Although animus may have motivated some supporters of the various state no-funding provisions, proponents had many legitimate rationales upon which to base their support, as well as numerous models extending back to 1835. Similarly, scant evidence suggests that anti-Catholic animus perpetrated the passage of either Article in the Missouri Constitution.

Thus, little evidence suggests anti-Catholicism played a significant role in the development of many early no-funding provisions. Instead, state constitution drafters were primarily concerned with financial security and the survival of the nascent public schools. Green, *supra*, *Insignificance of the Blaine Amendment*, at 327.

V. The 1870 and 1875 No-Funding Provisions of the Missouri Constitution Were Adopted for Legitimate Reasons in the Absence of Anti-Catholic Animus.

The Missouri Constitution contains three provisions that prohibit expending public monies in support of churches, sects, religious denominations, religious schools, or in aid of religion. The three provisions, while enacted at different times, demonstrate a strong

commitment among Missouri citizens to prevent the state from financially supporting religion and to ensure the integrity and financial stability of public education. The drafters of these various provisions did not act with prejudicial motives against one or more religions.

The first provision directs that "no person can be compelled to erect, support, or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher . . . ." Mo. Const. art. I, § 6. Later amendments expanded the latter clause to include "any sect, church, creed or denomination of religion." *Id.* Non-compelled support provisions commonly appeared in early state constitutions, tracing back to the Pennsylvania Constitution of 1776, Declaration of Rights, Art. II, and the Virginia Statute for Religious Freedom. The original Missouri Constitution drafters followed this precedent. Goldenziel, *supra*, at 64–65.

In 1870, the Missouri General Assembly considered amendments to the 1865 Constitution. The 1865 Constitution required the General Assembly to "establish and maintain free schools for the gratuitous instruction of all persons between the ages of five and twenty-one years." Mo. Const. of 1865, art. IX, § 1; *see also* William E. Parrish, et al., *Missouri: The Heart of the Nation* 202 (1980). That constitution also provided for the security of the public school fund, requiring that the "annual income of [the] fund, together with so much of the ordinary revenue of the state as may be necessary, shall be faithfully appropriated for establishing and maintaining the free schools . . . and for no other uses or purposes whatever." Mo. Const. of 1865, art. IX, § 5.

The inevitable increase in schools and sheer numbers of students placed strains on the state school fund, which public school advocates believed were vulnerable from private religious schools.[12] J. Michael Hoey, *Missouri Education at the Crossroads: The Phelan Miscalculation and the Education Amendment of 1870*, 95 MO. HIST. REV. 372, 377 (2001). In his report to the Missouri legislature, State School Superintendent Thomas Parker recommended a constitutional amendment to secure the school fund: "No portion of the funds now used for the support of public schools, nor the income therefrom, shall ever be applied in aid of any school or institution established or controlled by any religious body, sect, or denomination." *Id.* at 373. In response, General Assembly members overwhelmingly approved a proposed education amendment, beating back an amendment by a Democratic representative that would have divided the school fund between public and private schools.[13] *Id.* at 383, 390–93.

In 1875, Missouri held a constitutional convention, resulting in a revised constitution and the re-adoption of the no-compelled support clause, the provision securing the public school fund, and the 1870 education amendment. The education committee also adopted a resolution barring appropriating public

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[12] According to Hoey, in 1870 approximately 280,000 students attended public schools with an additional 40,000 students attending private and parochial schools. Students in Catholic schools comprised approximately one-half of that latter number. Hoey, *supra*, at 377.

[13] Missouri voters approved the education amendment by a 10-to-1 margin, with the "no" vote only registering an average of approximately 14 percent in the 10 counties with the heaviest Catholic population. *Id.* at 390–91.

money to "the different religious denominations, creeds, sects, or churches of this State to be used by such religious denominations, creeds, sects or churches for educational purposes." Aaron E. Schwartz, *Dusting Off the Blaine Amendment: Two Challenges to Missouri's Anti-Establishment Tradition*, 72 MO. L. REV. 339, 373 (2007). The convention adopted this resolution without dissent or any allegations of anti-Catholic motivations. In fact, Democrats—generally supportive of Catholics—dominated both the education committee and the convention as a whole. *Id.* at 372–73. The new educational amendment passed without controversy. *See id.* at 375–76.

No evidence suggests that religious controversies outside Missouri influenced delegates. *See id.* at 372–76. In fact, the convention met during May and June of 1875, months before both President Grant's Des Moines speech calling for prohibition of sectarian schools' funding and Representative Blaine's proposed amendment on December 14. Green, *supra*, *The Bible, the School, and the Constitution*, 187–94. Nothing connects Article I, § 7 and the Blaine Amendment. Nor does any evidence suggest Article I, § 7 was motivated by anti-Catholic animus. Therefore, no "credible connection" exists between Article 1, § 7 and religious animus.

CONCLUSION

This Court should affirm the Eighth Circuit's decision.

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TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.

PETITIONER

v.

SARA PARKER PAULEY, in her official capacity,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE LIBERTY COUNSEL AND NATIONAL HISPANIC CHRISTIAN LEADERSHIP CONFERENCE/CONELA IN SUPPORT OF PETITIONER SEEKING REVERSAL

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INTEREST OF AMICI[1]

Liberty Counsel is a civil liberties organization that provides education and legal defense on issues relating to religious liberty, the family and sanctity of life across the United States. Liberty Counsel is committed to upholding the historical understanding and protection of the rights to free speech and free exercise of religion, and to ensuring that those rights remain an integral part of the country's cultural identity. Liberty Counsel has represented countless individuals and organizations whose free exercise and free speech rights have been violated, and has developed a substantial body of information related to the history, ubiquity and importance of these rights to maintaining the fabric of freedom in the nation.

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[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this Brief. Petitioner has filed a blanket consent to the filing of Amicus Briefs in favor of either party or no party. Respondent has consented to the filing of this Brief and its written consent is being filed simultaneously with the Brief.

The National Hispanic Christian Leadership Conference ("NHCLC") is America's largest Hispanic Christian evangelical organization. NHCLC was founded in 1995 and, on May 1, 2014, merged with Conela, a Latin America-based organization, to become NHCLC/Conela, representing more than 500,000 churches throughout the world. NHCLC/Conela member churches seek to serve their communities through programs and ministries that meet the physical, social and spiritual needs of their neighbors. In some cases this includes, as is the case with Trinity Lutheran Church, providing preschool and day care centers and playgrounds that are open to all. NHCLC/Conela believes in partnering with public agencies to provide resources and services that benefit the entire community in ways that neither the public agencies nor NHCLC/Conela members could do on their own. NHCLC/Conela is concerned that these valuable partnerships could be endangered by the Eighth Circuit decision in that it could lead to loss of opportunities for, and denial of equal access to, the people NHCLC/Conela's members serve.

Amici respectfully submit this Amicus Brief to assist this Court in evaluating Petitioner's Free Exercise claim.

INTRODUCTION AND SUMMARY OF ARGUMENT

Are the children in the neighborhood surrounding Trinity Lutheran Church less deserving of a safe play space because their neighborhood playground happens to be owned by the church? Respondent believes so. Citing the misunderstood and misapplied mantra of "separation of church and state" as justification, Respondent denied Trinity Lutheran's request for a Scrap Tire Program grant solely because the church owns the property and Respondent feared that granting the request would constitute government aid to religion in violation of the Missouri Constitution.

Respondent's actions reflect a longstanding misconception that religious organizations must be quarantined from any contact with government funding or other benefits, even when, as is true here, the benefits are made available for purely secular functions, such as resurfacing a playground, and are distributed on the basis of neutral, objective criteria. This misconception marginalizes people like the children who use the playground for any distant association with a religious organization. More importantly, it displays the kind of hostility toward religion that this Court has long held incompatible with the First Amendment.

For the reasons that follow, Respondent's discrimination against and denial of equal access to Trinity Lutheran violates the Free Exercise and Free Speech clauses of the Constitution, and should be reversed.

LEGAL ARGUMENT

I. EXCLUDING TRINITY LUTHERAN'S DAY CARE CENTER FROM A NEUTRAL GRANT PROGRAM VIOLATES THE FREE EXERCISE CLAUSE AND DISREGARDS THIS COURT'S PRECEDENTS AND DECADES OF PUBLIC/PRIVATE PARTNERSHIPS THAT EFFECTIVELY MEET COMMUNITY NEEDS IN WAYS THAT ARE COMPATIBLE WITH THE FIRST AMENDMENT.

Like the carrier of a communicable disease, Trinity Lutheran Church has been excluded from fully participating in society for fear of passing on its "contagion." In this case, the "contagion" that threatens to "taint" the community is Trinity's status as a church. Despite placing fifth among forty-four applicants, Trinity Lutheran was denied, solely because it is a church, a grant that would have made the playground used by neighborhood

children safer and more accessible for disabled children. (Petition for Writ of Certiorari, at 7-8). The denial not only subjects neighborhood children to a suboptimal, inaccessible playground, but also contradicts this Court's precedents and decades of public-private partnerships that have improved the health and welfare of millions of children.

A. For More Than A Century, Communities Have Enjoyed A Social Welfare Safety Net Built Through The Cooperation Of Religious Organizations And Governmental Agencies.

Since the Pilgrims landed on Plymouth Rock in 1620, religious adherents have dedicated themselves to caring for their neighbors, particularly the indigent, neglected and sick, as part of their "fundamental theological commitment to charity and good works."[2] "Religious groups traditionally have

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[2] Thomas W. Pickrell & Mitchell A. Horwich, *Religion As An Engine Of Civil Policy: A Comment On The First Amendment Limitations On The Church-State Partnership In The Social Welfare Field,* 44 LAW & CONTEMPORARY PROBLEMS 111, 112 (1981).

worked to meet community welfare needs of every type,"[3] including, in Trinity Lutheran's case, the need for child care and for safe places to play. Thousands of faith-based organizations have received government funds and even partnered with government agencies to strengthen the social welfare safety net. As one researcher observed, "faith-based programs, especially in urban communities, are the backbone of broader networks of voluntary organizations that benefit the least, the last, and the lost of society."[4]

The American Jewish Congress describes some of the history and philosophy behind faith communities' commitment to social welfare and community betterment:

> The American Jewish community has historically devoted considerable effort to the founding and maintenance of various

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[3] *Id.*

[4] Scott W. Allard, *Access and Stability: Comparing Faith-based and Secular Nonprofit Service Providers*, 13-14, presented at The Impact of Religion and Faith-Based Organizations on the Lives of Low Income Families, National Poverty Center University of Michigan (2007), http://www.npc.umich.edu/news/events/religion&poverty_agenda/Allard.pdf.

> community welfare agencies: hospitals, nursing homes, child care agencies, day-care centers, community centers, and employment and guidance agencies. Along with traditional welfare services, some of these institutions provide the Jewish community with programs not offered in other such agencies; for example, kosher food, observance of Jewish holidays, [and] Jewish chaplains. . . . [B]y creating a distinctive Jewish ambiance in which social services are offered, these sectarian welfare agencies not only make it more likely that their service will reach and be used by all community members who need them, but also advance the organized Jewish community's stake in Jewish continuity.[5]

Notably, as the American Jewish Congress stated, faith-based organizations provide resources and services to all community members who need them. That is true of Trinity Lutheran, which makes its playground

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[5] American Jewish Congress, *Report of Task Force on Public Funding of Jewish Social Welfare Institutions* 1 (1986).

available not only to the students in its Learning Center, but also to neighborhood children, thus providing them with a safe place for recreation and exercise.

Trinity Lutheran's service to the community is part of a decades-old tradition of community service by faith-based organizations. In fact, 20 percent of all nonprofit human service organizations are religious organizations.[6]

> In many communities, religious nonprofits such as Catholic Charities, the Salvation Army, or Lutheran Social Services have provided critical service delivery capacity for several decades in a wide range of areas: job training; adult education; domestic violence counseling; child welfare; emergency food or cash assistance.[7]

In some cases, localities actually contract with faith-based organizations to provide material needs for low income citizens. "The city [New York] pays the organization [the Salvation Army] to run city shelters, and the state provides money for the Salvation Army's work

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6 Allard, at 13-14.

7 *Id.* at 16.

with parolees."[8] In New York City and throughout the country, "[f]aith-based organizations are an important component of the safety net, both public and private,"[9] and are provided with government funding to help in their endeavors. Today, religious organizations participate in a myriad of federal, state and local programs substantially similar to the Scrap Tire Program at issue in this case.[10]

Just as the Salvation Army provides critical services to assist families in New York, Trinity Lutheran provides critical services to assist families in Columbia, namely, child care and a safe outdoor play space. A Scrap Tire Program grant would enhance the safety of these beneficial services available to all in the community. Denying a grant, as Respondent has done, casts those in Trinity Lutheran's neighborhood as second class citizens,

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[8] Simpson, *Friend of the Poor: Salvation Army's Job Is Growing Tougher As Cries for Help Rise*, WALL ST. J. at sec. 1, p. 1 (Dec. 21, 1987).

[9] Allard at 41-42.

[10] Pickerell & Horwich at 113 n.16. This includes child care programs such as Title XX Day Care Services, 42 U.S.C. § 1397a (1976) and Head Start, 42 U.S.C. §§ 2931-2932 (1976). *Id.*

unworthy of a safer playground space merely because the playground is owned by a church.

Nothing in the decades-long tradition of public-private partnerships or this Court's precedents (described *infra*) supports such prejudicial treatment.

B. This Court Has Established That Excluding Faith-Based Organizations From Neutrally Available Government Benefits Used for Non-Sectarian Purposes Violates the Free Exercise Clause.

As far back as 1899 this Court established that government aid to church-affiliated nonprofit organizations that provide secular community services (such as Trinity Lutheran's preschool and playground), is constitutionally permissible, so long as the public funds are not used for sectarian purposes. *Bradfield v. Roberts*, 175 U.S. 291, 298 (1899). In *Bradfield*, this Court upheld a congressional grant of $30,000 to Providence Hospital which was owned and operated "under the auspices of the Roman Catholic Church," which "exercise[d] great and perhaps controlling influence over the management of the hospital." *Id.* at 298. The decisive question

for the Court was whether the hospital would fulfill the secular purposes of the statute; the mere fact of Providence Hospital's religious affiliation was "wholly immaterial." *Id.* at 299. Significant to this Court's analysis was the fact that the hospital receiving the grant in *Bradfield* did not confine its services to members of the Roman Catholic Church, but provided health care to all who needed it. *Id.* The same is true here. Trinity Lutheran does not limit access to its playground to church members, or the adherents of any particular faith, but makes it available to all neighborhood children who want a safe place to play.

In circumstances similar to this case, this Court found that the First Amendment did not preclude the state of New Jersey from extending taxpayer-funded bus transportation to students in parochial schools as well as to students in public schools. *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 16 (1947).

> New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment *commands that New Jersey cannot*

> *hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.* While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief.

Id. at 16-17 (emphasis added). *See also, Board of Education v. Allen,* 392 U.S. 236, 242 (1968) (secular textbooks loaned by the State on equal terms to students attending both public and church-related elementary schools was merely "extending the benefits of state laws to all citizens."). The same is true here. Approving a grant to Trinity Lutheran's Learning Center along with other qualified recipients would

mean merely extending the benefits of the Scrap Tire Program to all citizens, and in particular, to all of the children in the community. Under the Free Exercise clause, Respondent cannot hamper its citizens' free exercise rights by excluding Trinity Lutheran from receiving the benefits of state grants to improve playground safety.

Citing *Everson*, Justice Brennan said that excluding a private organization from participation in public benefits solely because of religious affiliation or inspiration violates the Free Exercise Clause by imposing a penalty for religious affiliation. *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring) "[G]overnment may not use religion as a basis of classification for the imposition of duties, penalties, privileges, or benefits. 'State power is no more to be used so as to handicap religions than it is to favor them.'" *Id.* (citing *Everson*, 330 U.S. at 18). In *McDaniel*, the Tennessee constitution contained a provision that disqualified ministers from serving as legislators. This Court held that the constitutional provision violated ministers' Free Exercise rights.

> The right to the free exercise of religion unquestionably encompasses the right to preach, proselytize, and perform other similar religious functions, or, in

> other words, to be a minister of the type McDaniel was found to be. . . . Yet, under the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is 'punishing a religious profession with the privation of a civil right.' In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion. 'To condition the availability of benefits including access to the ballot upon this appellant's willingness to violate a cardinal principle of his religious faith by surrendering his religiously impelled ministry effectively penalizes the free exercise of his constitutional liberties."

McDaniel, 435 U.S. at 626 (citing *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). "If appellant were to renounce his ministry, presumably he could regain eligibility for elective office, but if he does not, he must forgo an opportunity for political participation he otherwise would enjoy." *Id.* at 634 (Brennan, J., concurring).

Because the "provision imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity. . . . [it] compels the conclusion that it violates the Free Exercise Clause." *Id.* at 632. *See also, Falwell v. Miller*, 203 F.Supp.2d 624, 631 (W.D. Va. 2002) (finding the Virginia constitutional provision that prohibited incorporation of a church in violation of the free exercise clause of the First Amendment).

So too, here, Respondent's decision imposes a unique disability upon those like Trinity Lutheran who exhibit a defined level of intensity of involvement in protected religious activity–namely, running a day care and playground as a ministry of their church. As was true in *McDaniel*, in this case, if Trinity's Learning Center were to renounce its church affiliation it could retain eligibility for the grant program, but if it does not it must forgo an opportunity for playground safety improvements that all others enjoy. As was true in *McDaniel*, that Hobson's choice violates the Free Exercise clause. *Id.* at 632

In *Walz v. Tax Commission*, 397 U.S. 664, 689 (1970), this Court reiterated that government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential

to a vigorous, pluralistic society." *Id.* at 689. Emphasizing the constitutional principle of "neutrality," this Court noted that the tax benefit was provided to churches, "within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." *Id.* at 673. Similarly here, the Scrap Tire Program is provided to a broad class of nonprofit property owners from which churches should not be excluded.

When, as is true here, a grant program is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited," the fact that a religious organization might be a recipient of the funds does not offend the First Amendment. *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 488 (1986). As this Court explained:

> It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without

> constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary. It is equally well-settled, on the other hand, that the State may not grant aid to a religious school, whether cash or inkind, where the effect of the aid is "that of a direct subsidy to the religious school" from the State.

Id. at 486-87. In *Witters,* this Court found that the vocational rehabilitation grant program was of the former, permissible type, not the latter, impermissible kind. *Id.* at 488.

Furthermore, the critical question in analyzing a statute such as the grant program at issue here is not whether a recipient is "of a religious character," but "how it spends its grant." *Bowen v. Kendrick*, 487 U.S. 589, 624-25 (1988) (Kennedy, J. concurring). In this case, there is no question that Trinity Lutheran will spend its grant on improving the safety of the playground used by neighborhood children, not on sectarian instruction or materials.

Religious organizations such as Trinity Lutheran Church "need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Bd. of Pub. Works of Maryland*, 426 U.S. 736, 746-47 (1976). "We have never said that 'religious institutions are disabled by the First Amendment from

participating in publicly sponsored social welfare programs.'" *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993), (citing *Bowen*, 487 U.S. at 609). That being the case, Trinity Lutheran should not be denied grant funding that Respondent admits it is eminently qualified to receive, solely because Trinity Lutheran is a religious entity.

C. Carried To Its Logical Conclusion, Respondent's Denial Of Grant Funding Would Strip Faith-Based Organizations Of Public Safety Protection And Other Public Services.

Respondent's expansive interpretation of Article I §7 of the Missouri Constitution, if upheld, would lead to the kind of absurd results that this Court has said are incompatible with the First Amendment. In its letter denying Trinity Lutheran's grant request, Respondent said that it could not provide funds for safety improvements to the playground because it would violate the prohibition against state treasury funds being used to directly or indirectly aid any "church, sect, denomination or religion." (Petition for Certiorari, pp. 7-8). If the Missouri Constitution were read so broadly, then it would mean that neither Trinity Lutheran nor any faith-based property owner

could receive any publicly funded services, including police and fire protection, water and sewer service, or street and sidewalk maintenance. This Court has specifically rejected such expansive (and absurd) interpretations.

In *Everson*, this Court analyzed a similar "no aid" claim related to New Jersey's payment of bus fare for school transportation for all students, including those at parochial schools. 330 U.S. at 17.

> It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to

and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. *Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment.* That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-

> believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

Id. at 17-18 (emphasis added).

Similarly, this Court found that the First Amendment does not require that church-based schools be excluded from loans of state-purchased textbooks on secular subjects. *Board of Education v. Allen*, 392 U.S. 236, 248 (1968). "[W]here the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State 'so significantly and directly in the realm of the sectarian as to give rise to * * * divisive influences and inhibitions of freedom,' it is not forbidden by the religious clauses of the First Amendment." *Id.* at 249 (Harlan, J., concurring).

Therefore, "*Everson* and *Allen* put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity." *Roemer*, 426 U.S. at 746.

> The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the

> institution's resources to be put to sectarian ends. *If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way.*

Id. at 746-47 (emphasis added).

As this Court said in *Zobrest,* if religious groups were barred from receiving general government benefits, then it would lead to the "absurd result" that "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." 509 U.S. at 8. Consequently, "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." *Id.*

Respondent's denial of a Scrap Tire Program grant to improve playground safety for the children in Trinity Lutheran's neighborhood is precisely the kind of "absurd result' that this Court cautioned against in *Zobrest.* As a neutrally available government grant, the Scrap Tire Program should not be

denied to groups such as Trinity Lutheran merely because its playground is owned by a church.

II. PROVIDING TRINITY LUTHERAN EQUAL ACCESS TO NEUTRALLY AVAILABLE GRANT FUNDS WILL COMPORT WITH THIS COURT'S FREE SPEECH JURISPRUDENCE AND PREVENT IMPERMISSIBLE DISCRIMINATION ON THE BASIS OF RELIGION.

A. Applying An Equal Access Paradigm Would Promote Religious Neutrality.

Implicit in this Court's decisions upholding faith-based organizations' participation in neutrally available government benefits is the concept that equal access shows neutrality toward religion. In each of the cases, this Court found that the First Amendment was not offended when religious organizations received government-funded support on the same terms and conditions as did state-run or secular organizations. *See e.g., Zobrest,* 509 U.S. at 8. In fact, this Court has said that excluding religious organizations from such neutrally available benefits actually discriminates against religion in a way that violates the Constitution. *Mitchell v. Helms,*

530 U.S. 793, 827-29 (2000). Such exclusions are "born of bigotry" and "should be buried now." *Id.*

This Court's decisions rejecting religiously-based discrimination against faith-based organizations in the free speech context should be equally applied in Free Exercise challenges because equal access to government facilities is analogous to the neutrality required in government funding cases. As one commentator noted:

> Although *Good News Club*[11] and *Rosenberger*[12] analyzed the legality of the discrimination under the Free Speech Clause, the discriminatory character of the exclusions also raises Free Exercise concerns. Specifically, denying funding to a "Christ-centered" education in this context, as required under a broad exclusion, constitutes religious discrimination and violates the neutrality required by the Free Exercise Clause.[13]

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11 *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001).

12 *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 839-40 (1995)

13 Stuart J. Lark, *Equal Treatment for Religious Expression After Colorado Christian*

In the words of constitutional scholar Eugene Volokh:

> Equality rings truer to our notions of the government's proper role with regard to religion than does discrimination. The Constitution bars the "establishment of religion," and treating everyone the same without regard to religion is hard to see as "establishing" anything--except equality.[14]

The Establishment Clause does not permit government preferences for religion. *Larson v. Valente*, 456 U.S. 228, 244 (1982). However,

> equal treatment of religious and nonreligious people and institutions is perfectly fine, and such equal treatment maintains the separation of church and state by keeping the government scrupulously separate from people's decisions about religion.

University v. Weaver, 10 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 121, 125 (2009).

[14] Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 345 (1999).

> The government facilitates a particular sort of behavior (whether it be university education, charitable giving, or K-12 education) *[or in this case, operating a child care center and playground]* without any concern about whether the behavior is religious or not.[15]

Providing support to a religious organization on an equal basis with similar non-religious organizations is consistent with the First Amendment since, "the government is not in any way 'mak[ing] adherence to a religion relevant to a person's standing in the political community.'"[16] Such equal treatment also comports with the Founders' view of the meaning of the Establishment Clause, *i.e.*, that it was aimed at preventing government preference for religion, not inclusion in neutral benefit programs.[17] James Madison wrote his *Remonstrance Against Religious Assessments* to oppose a bill that would have accorded preferential governmental funding for "Teachers of the Christian Religion," which Madison said "violate[d] that equality which

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15 Id.

16 *Id.* (citing *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring in the judgment)).

17 *Id.* at 351.

ought to be the basis of every law."[18] By contrast, including a religious organization in a funding program will foster the equality that ought to be the basis of every law.

Applying an equal access paradigm in the Free Exercise context recognizes a critical component underlying the protections described throughout the Bill of Rights, *i.e.*, protection from impermissible discrimination.[19]

> The Free Exercise Clause is generally and properly understood as barring discrimination against religion. The Free Speech Clause is generally and properly understood as barring discrimination against religious speech, a constraint that fits well into the general principle that free speech means no government discrimination based on viewpoint (or often even content). The Equal Protection Clause asserts that certain traits, including religion and, I believe, religiosity, should not be bases for governmental classifications. [20]

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18 *Id.*

19 *Id.* at 365.

20 *Id.* at 371-72.

Therefore, just as the Free Speech clause condemns the exclusion of religious organizations from public fora as impermissible viewpoint discrimination, so too should the Free Exercise clause condemn the exclusion of religious organizations from neutral government grant programs as impermissible discrimination on the basis of religion.[21]

> Whereas the state establishes a public forum under the Free Speech Clause to facilitate private speech within the confines of the subsidized program, an equivalent concept under the Free Exercise Clause would apply to those instances in which the government facilitates private action within the confines of the subsidized program.[22]

Applying the equal access paradigm to Free Exercise challenges creates a familiar framework for determining when exclusion of a religious organization from a government program constitutes religion-based

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21 John P. Scully, *Unifying The First Amendment: Free Exercise, The Provision Of Subsidies, And A Public Forum Equivalent*, 54 DEPAUL L. REV. 157, 185 (2004).

22 *Id.*

discrimination in violation of the Free Exercise clause.[23] Under this framework, the state can limit participation to organizations and activities that comport with the overall purpose of the government program, but cannot exclude organizations that engage in the activities served by the program merely because they happen to be religious.[24] In other words, "[a]s public forums in free speech case law must be viewpoint neutral, any analogous concept under the Free Exercise Clause would necessarily demand neutrality with regard to religion."[25]

B. Protection From Government Hostility Toward Religion Is Critical In Free Exercise Analysis.

Just as viewpoint neutrality is critical to Free Speech analysis, religious neutrality is at the heart of this Court's Free Exercise jurisprudence, which emphasizes that the government may not "impose special disabilities on the basis of religious views or religious status." *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S.

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23 *Id.* at 186.

24 *Id.*

25 *Id.* at 187.

872, 877 (1990). "Free exercise of religion" encompasses more than just religious beliefs and professions of faith, but also includes physical acts such as gathering for worship, abstaining from certain foods, or abstaining from certain modes of transportation. *Id.* Or, in the case of Trinity Lutheran, the provision of educational and recreational facilities for the neighborhood. "It would be true, we think (though no case of ours has involved the point), that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Id.*

That was the case in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993), in which this Court concluded that an anti-animal cruelty ordinance violated the Free Exercise Clause. This Court found that the ordinance prohibited the killing of animals only in ways that corresponded to religious practices. *Id.*

> At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.

Id. at 532. Even if, as was the case of the ordinance in *Lukumi*, the language is facially neutral, it will be invalidated under the Free Exercise clause if it targets religious conduct for disfavored treatment. *Id.* at 534. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id.* "The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.*

C. Protection From Government Hostility Toward Religious Viewpoint Is Integral To Free Speech Analysis.

Protection from government hostility toward religious organizations is also at the heart of this Court's Free Speech decisions invalidating state actions excluding religious organizations from public fora. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001). These precedents provide further support for overturning the Eighth Circuit's decision as improperly sanctioning Respondent's impermissible discrimination against Trinity Lutheran on the basis of religion.

In *Lamb's Chapel*, this Court concluded that the school district had violated the First Amendment when it excluded a church-sponsored film on family values from use of school buildings after hours because the film dealt with the issue from a religious viewpoint. 508 U.S. at 393. The Court found that showing a film about child rearing and family values would be a permissible use of school buildings for social or civic purposes, but because the film presented that subject matter from a religious perspective it was disallowed. *Id.* at 393-94.

> In our view, denial on that basis was plainly invalid under our holding in *Cornelius* [*v. NAACP Legal Defense & Education Fund*]...473 U.S. [788,] 806 [(1985)]...that "[a]lthough a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum ... or if he is not a member of the class of speakers for whose especial benefit the forum was created ..., the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."

Id. at 394. "The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Id.* (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, (1984)). "That principle applies in the circumstances of this case." *Id.*

As Respondent does here, the school district in *Lamb's Chapel* claimed that it was justified in excluding the film because permitting the showing would violate the Establishment Clause. *Id.* at 395. This Court rejected the claim.

> The posited fears of an Establishment Clause violation are unfounded. The showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances,... there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the

> Church would have been no more than incidental.

Id. at 395. The same is true here. Approving a Scrap Tire Program grant so that Trinity Lutheran's neighborhood playground could be resurfaced would not be viewed by the community as an endorsement of religion. All children in the community who use the playground would benefit from the safer surface. The fact that some of the children who benefit might be the children of church members would be incidental at best.

In *Rosenberger,* this Court similarly rejected an Establishment Clause defense raised by the University of Virginia as justification for its denial of student activity funds for a religious student newspaper. 515 U.S. 819, 839-40 (1995). This Court reiterated that in "enforcing the prohibition against laws respecting establishment of religion, we must 'be sure that we do not inadvertently prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious belief.'" *Id.* at 839 (citing *Everson*, 330 U.S. at 16). "We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.* (citing *Witters,* 474 U.S.

at 487-88). "More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design" [such at the Scrap Tire Program at issue here]. *Id.* (citing *Lamb's Chapel*, 508 U.S. at 393-94).

As is true of the Scrap Tire Program, the governmental program at issue in *Rosenberger* "is neutral toward religion." *Id.* at 840.

> There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life.

Id. In *Rosenberger* the religiously themed student newspaper was one of 15 applicants for support for "student news, information, opinion, entertainment, or academic communications media groups." *Id.* The student organization "did not seek a subsidy because of its Christian editorial viewpoint; it

sought funding as a student journal, which it was." *Id.*

Likewise, in this case, Trinity Lutheran is one of more than 40 applicants seeking grants for safety improvements to playgrounds. It was not seeking a subsidy because of its religious viewpoint, but because it has a playground available to the general public that is in need of resurfacing. As was true with the student publication in *Rosenberger*, Trinity Lutheran should not be excluded from the neutral funding program aimed at improving playground safety.

Citing *Rosenberger*, this Court similarly rejected exclusion of the Christian-based Good News Club from an elementary school's after hours program. *Good News Club,* 533 U.S. at 114.This Court reiterated that neutrality toward religion is key, and that state benefits will be upheld when they are offered to "a broad range of groups or persons without regard to their religion." *Id.* (citing *Mitchell*, 530 U.S. at 809). The Court said that the school district's "implication that granting access to the Club would do damage to the neutrality principle defies logic." *Id.* The "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.* (citing *Rosenberger*, 515 U.S. at 839). "The Good News

Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups." *Id.*

Likewise, here, Trinity Lutheran seeks nothing more than to be treated neutrally and given the opportunity to obtain funds to improve the safety of its playground, as have other nonprofit organizations. Excluding Trinity Lutheran from the Scrap Tire Program exhibits hostility toward religion that is contrary to the neutrality principle central to this Court's Free Exercise and Free Speech precedents.

This Court has recognized that the neutrality principles espoused in its Free Exercise and Free Speech precedents specifically limit the State of Missouri's interest in offering greater separation between church and state than is implied in the Establishment Clause. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). In *Widmar*, as in this case, the university attempted to justify its exclusion of a religious organization from a student activities forum by citing to the same exact state constitutional provision at issue in this case, *i.e.*, the "no government aid to religion" clause of the Missouri Constitution, Article I §7. *Id.* at 275. As Respondent does here, the university in *Widmar* argued that the state constitution required an even higher "wall of separation" between church and state than does the United State Constitution, thereby heightening the

state's compelling interest in avoiding an establishment of religion. *Id.* The Court rejected the claim without reaching the question of whether the state constitution could enact a greater separation than does the federal constitution. *Id.* Regardless of whether the state constitution can erect a "higher wall," its interest in avoiding establishment of religion is limited by the free exercise and free speech rights of the student organizations. *Id.* at 276. In light of the special solicitude given to those rights, "we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech." *Id.*

In this case, the state's interest in avoiding an establishment of religion is even less compelling than in *Widmar* since Trinity Lutheran is not seeking to use grant funds for religious activities, but solely to resurface the playground that is used by all neighborhood children. The more attenuated connection between Trinity Lutheran's religious activities and the grant expenditures means an even lower likelihood that Respondent reasonably could be viewed as giving government money to aid religion. This Court should reject Respondent's attempt to use the state constitution to justify religious discrimination.

CONCLUSION

The children who use Trinity Lutheran's playground do not deserve to be treated as constitutional orphans, barred from receiving a grant to improve the safety of their play area just because it happens to be owned by a church. This Court has consistently rejected attempts to exclude religious organizations from neutrally available federal aid programs.

Trinity Lutheran was eminently qualified to receive a Scrap Tire Program grant and it should not have been denied that opportunity solely because it is a church. Respondent's denial of grant funding constitutes impermissible religious discrimination with no extenuating circumstances, including threat of an Establishment Clause violation.

For these reasons, this Court should reverse the Eight Circuit's ruling.

April 21, 2016.

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RECORD AND BRIEFS

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No. 15-577

IN THE
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARAH PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS SUPPORTING PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Amici are members of the United States Senate and House of Representatives with a common interest in robust protections for the free exercise of religion. The members of the Legislative Branch have long had a profound concern for protecting the religious liberties of

[1] Petitioner's counsel of record consented to the filing of this brief by filing a blanket consent with the Clerk. Respondent's counsel of record consented to the filing of this brief by email dated April 12, 2016. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici*, their counsel, or their members made a monetary contribution intended to fund the preparation or submission of this brief. Undersigned counsel were engaged by Senator Blunt (MO) and Representative Hartzler (MO) to prepare this brief. Additional *amici* subsequently consented to join this brief in support of Petitioner at the invitation of Senator Blunt and Representative Hartzler.

United States citizens, and when they have seen those liberties threatened, they have taken decisive action to bolster or restore those freedoms. The Religious Freedom Restoration Act of 1993, for example, was passed by a unanimous House and an almost-unanimous Senate, and the Religious Land Use and Institutionalized Persons Act passed in both the House and the Senate by unanimous consent. As members of the Legislative Branch, *amici* possess a unique perspective on the complex task of making laws that ensure neutral and even-handed treatment to persons of all faiths, and that comport with the solemn guarantees of the Free Exercise Clause of the First Amendment. *Amici* believe that applying Missouri's "no-aid" provision to deny Trinity Lutheran's participation in Missouri's scrap tire program explicitly targets religion for discrimination, and therefore runs afoul of both the Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause.

Amici are:

United States Senators

Roy Blunt (MO)
Ted Cruz (TX)
Steve Daines (MT)
James M. Inhofe (OK)
James Lankford (OK)
Jerry Moran (KS)
Marco Rubio (FL)
Ben Sasse (NE)
Thom Tillis (NC)

Members of the House of Representatives

Brian Babin (TX)
Diane Black (TN)
Jeff Duncan (SC)
John Fleming, M.D. (LA)
J. Randy Forbes (VA)
Trent Franks (AZ)

Bob Goodlatte (VA)
Gregg Harper (MS)
Andy Harris, M.D. (MD)
Vicky Hartzler (MO)
Tim Huelskamp (KS)
Randy Hultgren (IL)
Bill Johnson (OH)
Mike Kelly (PA)
Doug LaMalfa (CA)
Barry Loudermilk (GA)
Blaine Luetkemeyer (MO)
Jeff Miller (FL)
Steven Palazzo (MS)
Steve Pearce (NM)
Peter J. Roskam (IL)
Steve Russell (OK)
John Shimkus (IL)
Ann Wagner (MO)
Tim Walberg (MI)

SUMMARY OF ARGUMENT

The Religion Clauses of the First Amendment chart a course that prevents both "governmentally established religion" and "governmental interference with religion." *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970). As the Court has repeatedly recognized, neutrality in Government's treatment of religion is a key principle in avoiding "government control of churches or governmental restraint on religious practice." *Ibid.*; see also *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.").

The Free Exercise Clause has always been understood to guarantee a special solicitude toward religion, which is violated by anything less than neutral treatment of reli-

gion by government. The Court similarly has held that a central purpose of the Establishment Clause is to ensure governmental neutrality in matters of religion. This neutrality even allows government programs to benefit religion directly, so long as the programs are applied even-handedly to non-religious beneficiaries. Conversely, neutrality decidedly does not require the denial of generally available government benefits to religious persons and institutions because they are religious. See *Rosenberger*, 515 U.S. at 839.

Far from observing a "benevolent neutrality" toward religion, *Walz*, 397 U.S. at 669, Missouri's denial of Trinity Lutheran's application to participate in the scrap tire program evinces active hostility to religious institutions. Despite meeting all secular criteria for the program, Trinity Lutheran was denied participation solely because it is a church. This Court has rejected similar applications of that sort of strict "no-aid" policy as "unfaithful to our constitutionally protected tradition of religious liberty." *McDaniel* v. *Paty*, 435 U.S. 618, 638 (1978) (Brennan, J., concurring in judgment).

This Court has recognized only one exception to the neutrality principle in the provision of generally available public benefits, and that is in the context of providing government funding for the religious training of clergy. *Locke* v. *Davey*, 540 U.S. 712, 725 (2004). It is beyond dispute that providing a safe play area for children does not implicate the same historical concerns as funding the pursuit of devotional degrees. In excluding all religious entities from participating here, Missouri's prohibition sweeps far more broadly than the Washington provision upheld in *Locke*, which prohibited funding only to students who majored in devotional theology, while allowing funding to students who attended religious colleges and those who attended religious classes. Upholding the application of the Missouri no-aid provision in this case would cut

squarely against the neutrality principle articulated throughout this Court's Religion Clause jurisprudence.

Missouri's rejection of Trinity Lutheran's application solely because it is a church likewise violates the Equal Protection Clause, which separately guarantees religion equal treatment in the provision of generally available public benefits. When government action burdens religion and fails to meet the *Employment Division* v. *Smith* standard of neutrality and general applicability, it receives strict scrutiny. Here, Missouri has neither articulated a compelling state interest, nor shown that the blanket exclusion of religious institutions from generally available public benefits is narrowly tailored. Consequently, the no-aid provision fails strict scrutiny and violates the guarantee of equal protection under the law.

ARGUMENT

I. MISSOURI VIOLATED THE FIRST AMENDMENT'S MINIMUM REQUIREMENT OF NEUTRALITY TOWARD RELIGION.

A. The Free Exercise Clause requires at least neutrality toward religion.

1. As understood by the Framers, the Free Exercise Clause permits nothing less than neutrality toward religion in the provision of government benefits. That bare minimum requirement of neutrality prohibits the targeted discrimination against religion mandated by the Missouri Constitution's no-aid provision.

The impetus behind what became the Free Exercise Clause came from Antifederalists like Patrick Henry, who were alarmed by the Constitution's lack of explicit protection for religion, which threatened to leave the federal government unencumbered by the sort of protections "that had been hard won at the state level." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV.

1409, 1476 (1990). John Leland, the leader of the Virginia Baptists who voted unanimously to oppose ratification because the Constitution insufficiently protected religion, observed that "if Oppression dose not ensue, it will be owing to the Mildness of administration & not to any Constitutional defence." *Ibid.* (citing 4 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 528 (U.S. Dep't of State ed. 1905)). It was only Madison's concerted efforts to secure "the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude," that ultimately allayed those concerns and led to the Constitution's ratification. *Id.* at 1477 (citing Letter from James Madison to Rev. George Eve (Jan. 2, 1789), in 11 THE PAPERS OF JAMES MADISON 404-405 (R. Rutland & C. Hobson eds. 1977)).

The Free Exercise Clause's drafting history confirms the Framers' understanding that they were guaranteeing *at least* government neutrality toward religion. As Professor McConnell has ably detailed, the drafters in both the Senate and the House approved the phrase "free exercise of religion" instead of the phrase "rights of conscience" to describe the protected rights. *Id.* at 1488-1500. This substitution communicated a special solicitude for religion by reflecting the then-universal understanding that the "exercise of religion" necessarily included conduct as well as belief. *Id.* at 1490. Moreover, the use of the term "religion" instead of "conscience" made clear that the freedom "encompasses the corporate or institutional aspects of religious belief," not just the individual judgment of religious people. *Ibid.* Accordingly, "the 'free exercise of religion' suggests that the government may not interfere with the activities of religious bodies, even when the interference has no direct relation to a claim of conscience." *Ibid.*

This widespread view—that religious freedom meant special protection for both the faith *and* the activities of individuals *and* their churches—is reflected in later Free Exercise Clause analysis. In 1947, for example, following the advent of the administrative state, this Court articulated the principle that a state "cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude * * * the members of any * * * faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Everson* v. *Board of Ed. of Ewing Twp.*, 330 U. S. 1, 16 (1947).

In light of this early prevailing view that churches were just as protected under the Free Exercise Clause as individuals, *Everson* is properly read to prohibit states from excluding a church "from receiving the benefits of public welfare legislation" merely because it is a church. *Ibid.* In other words, churches, just like individuals, must be treated at least neutrally in the provision of generally available public benefits. As Justice Kennedy has recognized, this principle has particular salience in the present day, for "as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality." *Cnty. of Allegheny* v. *ACLU*, 492 U.S. 573, 657-658 (1989) (opinion of Kennedy, J.).

2. While not always explicitly relying on the Framers' concern for a baseline posture of State neutrality toward religion, the Court has long applied the "general principle deducible from the First Amendment" that it "will not tolerate either governmentally established religion or governmental interference with religion." *Walz*, 397 U.S. at 669. Any "play in the joints" between the requirements of the Free Exercise Clause and the prohibi-

tions of the Establishment Clause must therefore be "productive of a benevolent neutrality." *Ibid.* This neutrality is not a rigid one, and the Court has "rejected as unfaithful to our constitutionally protected tradition of religious liberty, any conception of the Religion Clauses as stating a 'strict no-aid' theory." *McDaniel*, 435 U.S. at 638 (Brennan, J., concurring in judgment).

This Court's rejection of a "no-aid" interpretation of the First Amendment dovetails with its strong condemnation of laws that would specifically target religion for unfavorable treatment. As the Court affirmed in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, laws that affirmatively discriminate against religion "violate[] the Nation's essential commitment to religious freedom." 508 U.S. 520, 524 (1993). When a law ceases to act at least neutrally toward religion, it is no longer a law of general applicability. And a "law failing to satisfy these requirements [of neutrality and general applicability] must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-532.

B. The baseline requirement of neutrality also underpins the Establishment Clause.

The Establishment Clause requires a baseline of neutrality no less than the Free Exercise Clause. Indeed, the "central purpose of the Establishment Clause * * * [is to] ensure[] governmental neutrality in matters of religion." *Gillette* v. *United States*, 401 U.S. 437, 449 (1971). It is therefore unsurprising that this Court has recognized "a general harmony of purpose between the two religious clauses of the First Amendment." *Id.* at 461.

Importantly, neutrality cannot mean hostility to religion. The Establishment Clause "does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them." *Everson*, 330 U.S. at 18; see also *Sch. Dist. of Abington*

Twp., Pa. v. *Schempp*, 374 U.S. 203, 295 (1963) (Brennan, J., concurring) ("[T]he First Amendment commands not official hostility toward religion, but only a strict neutrality in matters of religion."). "To withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances *nor inhibits* religion." *Abington*, 374 U.S. at 222 (emphasis added). Thus, while the Establishment Clause prohibits official support of any particular religious belief, it also forbids official hindrance of religion.

Neutrality means that "there may be myriad forms of involvements of government with religion which * * * should not * * * be deemed to violate the Establishment Clause." *Id.* at 295 (Brennan, J., concurring). "Government activities" may "touch on the religious sphere" so long as they are "secular in purpose, evenhanded in operation, and neutral in primary impact." *Gillette*, 401 U.S. at 450. Indeed, "[t]his Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie* v. *Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144-145 (1987).

Examples abound of permissible government involvement with religious institutions. "[T]he [public] fire and police protection received by houses of religious worship" is not at odds with the Establishment Clause. *Walz*, 397 U.S. at 676. Nor is exempting religious institutions from taxes. See *id.* at 680. States can (and sometimes must) account for religious obligations in their unemployment laws. See *Hobbie*, 480 U.S. at 146 ("[T]he State may not force an employee 'to choose between following the precepts of her religion and forfeiting benefits, * * * and abandoning one of the precepts of her religion in order to accept work.'" (quoting *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963)). States also may appropriate public funds to

pay for transporting students to parochial schools without violating the Establishment Clause. See *Everson*, 330 U.S. at 17 ("[W]e cannot say that the First Amendment prohibits New Jersey from spending taxraised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools."). As these examples demonstrate, neutrality does not and, as a practical matter, cannot mean purposeful exclusion of religious persons and institutions from generally available government benefits.

C. Missouri's denial of Trinity Lutheran's application to participate in the scrap tire program violates the First Amendment's neutrality principle embodied in both the Free Exercise and Establishment Clauses.

It is undisputed that Missouri rejected Trinity Lutheran's application to participate in the scrap tire program for the *sole reason* that Trinity Lutheran is a church. Trinity Lutheran was one of forty-four applicants for a scrap tire grant in 2012. Under the State's neutral evaluation criteria, Trinity Lutheran's application not only qualified it for funding, it ranked fifth. Because fourteen projects were funded, there is no dispute that, but for its status as a church, Trinity Lutheran would have received a grant. Missouri's application of its no-aid provision to deny Trinity Lutheran the right to participate in the scrap tire program contravenes the neutrality principle that informs both the Free Exercise and Establishment Clauses.

1. As applied in this case, the no-aid provision violates the Free Exercise Clause. Unlike the prohibition on peyote use upheld in *Employment Division* v. *Smith*, Missouri's no-aid provision is not a "neutral law of general applicability," 494 U.S. 872, 879 (1990), but rather is discriminatory on its face, singling out parties for dispar-

ate treatment solely on the basis of religion. Indeed, viewed in *Smith*'s light, the Missouri no-aid provision works a particularly cruel irony. While *Smith* ensures that Trinity Lutheran cannot escape the adverse effects of a neutral law of general applicability that abridges religious freedoms, Missouri's constitution requires that Trinity Lutheran be denied the privileges of neutral laws of general applicability that confer benefits. Thus, under the no-aid provision, religious institutions get *all* the burdens but *none* of the benefits of generally applicable laws. Such an untenable position is anathema to the notion of benevolent neutrality.

Even if Missouri's practice of denying publicly available benefits solely on the basis of religion were not facially discriminatory, the denial would still be invalid because the Free Exercise Clause forbids even "subtle departures from neutrality" and "covert suppression." *Lukumi*, 508 U.S. at 534. The denial of Trinity Lutheran's application thus exemplifies the "prohibit[ed] misuse of secular governmental programs" to "impede the observance of one or all religions * * * even though the burden may be characterized as being only indirect." *Gillette*, 401 U.S. at 462

2. The no-aid provision also finds no support in the neutrality principle that undergirds the Establishment Clause. But for the application of the no-aid provision, the scrap tire program would have treated all comers equally on the basis of its objective, secular criteria. The scrap tire program is analogous to the funding of transportation to all schools, parochial or public, upheld in *Everson*. It deploys government funds to fulfill the secular aims of the program—providing safe recreational facilities for Missouri's children. The mere fact that a church owns a playground to which the program granted funds raises no Establishment Clause concern. Indeed, this Court has found that the "guarantee of neutrality is

respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S. at 839.

The Missouri no-aid provision, however, transformed what would have been a "benevolent neutrality" toward religious institutions, *Walz*, 397 U.S. at 669, into outright hostility. Disqualifying an entity from receiving state aid solely because it is a religious institution violates the Establishment Clause's prohibition against laws with a "legislative purpose [or] a primary effect that * * * inhibits religion." *Abington*, 374 U.S. at 222. The no-aid provision "handicap[s] religions," *Everson*, 330 U.S. at 18, putting religious institutions at a distinct disadvantage by shutting them out of secular government programs that could have otherwise funded the secular aspects of their operations, such as providing a recreational area for students and the public. The Establishment Clause neither requires nor permits such hostility towards religion.[2]

3. The consistent emphasis this Court has placed on neutrality throughout its Religion Clause jurisprudence is not undone by *Locke*. Children playing on an outdoor playground are far afield from "the pursuit of devotional degrees" at issue in *Locke*. 540 U.S. at 725. Indeed, unlike the "essentially religious endeavor" of "[t]raining someone to lead a congregation," *id.* at 721, there is no such thing as an "essentially religious" playground. And

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[2] *Luetkemeyer* v. *Kaufmann* does not change this conclusion. 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974). The trial court in that case characterized Missouri's no-aid provision as merely "enforc[ing] a more strict policy of church and state separation than that required by the First Amendment." *Id.* at 386. That justification of the no-aid provision is flatly inconsistent with the Court's later decisions in *McDaniel* and *Widmar*, which rejected heightened enforcement of church-state separation as a compelling state interest.

the recycled rubber poured on a church-owned playground at state expense implicates no greater pieties than rubber surfacing at a secular facility. Thus, Missouri's broad exclusion of religious entities warrants the "presumption of unconstitutionality" that the Court declined to apply in *Locke*.

Denial of Trinity Lutheran's application solely because it is a church goes beyond even the hypothetical "what next?" that Justice Scalia posed in his *Locke* dissent. There, he asked incredulously whether we would next "deny priests and nuns their prescription-drug benefits." *Locke*, 540 U.S. at 734 (Scalia, J. dissenting). Here, Missouri refuses to provide a safe play area not only for children attending a day care, but also for neighborhood children who play there after hours, solely because the day care is church-run. Like the unconstitutional ordinances in *Lukumi*, Missouri's denial of Trinity Lutheran's application on the basis of its no-aid provision violates the "minimum requirement of neutrality," that a law or a government practice "not discriminate on its face," not "subtl[y] depart[] from neutrality," or not "covert[ly] suppress[]" religion. *Lukumi*, 508 U.S. at 533-534.

II. MISSOURI'S ACTION CANNOT SATISFY STRICT SCRUTINY UNDER EITHER THE RELIGION CLAUSES OR THE EQUAL PROTECTION CLAUSE.

A. The no-aid provision warrants strict scrutiny.

Because Missouri treated entities differently solely on the basis of religion, it violated the Religion Clauses of the First Amendment as well as the Equal Protection Clause, and can only prevail if it advances a compelling government interest that is narrowly tailored to achieve that interest.

Consistent with the neutrality principle in the Religion Clauses, the Court has regularly held that religious groups are entitled to heightened protection from unequal treatment by the government, and where govern-

ment actions burden religion and fail to meet the standard of neutrality and general applicability, they receive not rational basis review, but strict scrutiny. See, *e.g.*, *Lukumi*, 508 U.S. at 546; *Hobbie*, 480 U.S. at 140-141; *Thomas* v. *Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 718 (1981); *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972). The analysis is no different under the Equal Protection Clause, which protects against unequal application of neutral, generally applicable laws on the basis of religion.[3] Whether analyzed under the Religion Clauses or the Equal Protection Clause, Missouri's denial of Trinity Lutheran's participation in a generally available program solely because it is a church fails both prongs of the strict scrutiny analysis: It advances no compelling state interest and it is not narrowly tailored.

B. Denying Trinity Lutheran a safe, rubber-surfaced playground for its children advances no compelling governmental interest.

The governmental interests that have been held to satisfy strict scrutiny are far more compelling than Missouri's purported interest here.[4] Indeed, the Court has even rejected the very interest that Missouri asserts in this case: "achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution." *Widmar* v. *Vincent*,

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[3] This Court has long recognized the applicability of the Equal Protection Clause in the religious freedom context. In *Walz*, the Court noted that "neutrality in its application requires an equal protection mode of analysis." 397 U.S. at 696. Similarly, in his *McDaniel* concurrence, Justice White noted he would hold the religion-burdening state provision at issue "unconstitutional under the Equal Protection Clause of the Fourteenth Amendment." 435 U.S. at 643 (White, J., concurring).

[4] See, *e.g.*, *Hernandez* v. *Comm'r*, 490 U.S. 680, 699 (1989) (finding a "broad public interest in maintaining a sound tax system" sufficiently compelling to justify denying tax exemption for contributions to the Church of Scientology when contributions had *quid pro quo* elements).

454 U.S. 263, 276 (1981). In *Widmar*, the Court held that a Missouri university's decision to exclude religious groups from a school forum failed strict scrutiny, concluding that the interest Missouri asserted was not sufficiently compelling to justify discrimination against religious speech. *Id.* at 267.

The Court has also rejected the argument that avoiding an illusory Establishment Clause violation constitutes a compelling government interest justifying a burden on religion. In *Lamb's Chapel* v. *Center Moriches Union Free School District*, a church brought First Amendment and Equal Protection claims against a school district for refusing to allow viewing of a religious video after school hours, when the school allowed myriad other types of community meetings during after-school hours. 508 U.S. 384, 394-395 (1993). Although the district claimed a compelling interest in avoiding an Establishment Clause violation, the Court found no credible threat to the Establishment Clause in allowing the presentation of a video not sponsored by the school and open to the public—much less one that could be considered a compelling government interest. *Id.* at 395.

Lamb's Chapel teaches that states may not point to an interest in avoiding an imaginary Establishment Clause violation as sufficiently compelling to deny equal treatment to religious groups and individuals. It follows that Missouri's defense must fail, for it does not even *claim* that allowing Trinity Lutheran's participation would violate the Establishment Clause.[5]

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[5] Notably, the Court did not apply strict scrutiny in *Locke* because the narrow prohibition on funding devotional degrees prohibited neither funding of religious institutions nor even students taking religious classes. 540 U.S. at 724-725. Missouri's prohibition here triggers strict scrutiny because it sweeps far more broadly, depriving all religious institutions of funding that is otherwise generally available.

C. The no-aid provision is not narrowly tailored.

Even if this Court determined that Missouri's interest in pursuing enhanced church-state separation constituted a compelling interest, Missouri could not show that the measure is narrowly tailored. The denial of an otherwise deserving application solely on religious grounds harms all the children and families who would otherwise benefit from state-sponsored improvements to playgrounds owned by religious institutions.

Further, to the extent the intended goal is to prohibit any public aid to religious entities, the goal is both impractical and legally unacceptable. After all, nobody seriously contends that states may refuse to offer law enforcement protection, utilities, or other basic municipal services to religious individuals and entities.

Because Missouri is unable to satisfy either prong of the strict scrutiny standard, the burden it places on Trinity Lutheran is impermissible under the Religion Clauses and the Equal Protection Clause.

CONCLUSION

Amici respectfully request that the judgment of the Court of Appeals be reversed.

Respectfully submitted.

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RECORD AND BRIEFS

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In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR, MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF EVANGELICALS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Evangelicals (NAE) is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions, and individuals that includes more than 45,000 local churches from forty different denominations and serves a constituency of over twenty million people.

The NAE believes religious freedom is a gift of God and vital to the limited state which is our American constitutional republic. Among its policy positions, NAE believes "school choice" empowers parents, who have the best interests of their children at heart, and that school choice is an important means by which our failing K-12 educational system in America's inner-cities can be reformed.

NAE has also been a supporter of "charitable choice" in faith-based social service funding, and in that regard has encouraged the promulgation of the Equal-Treatment Regulations in the Bush and Obama Administrations. This appeal involves both policies.

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[1] *Amicus curiae* affirms under Rule 37.6 that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund this brief. No person, other than *amicus*, its members, or its counsel, made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, all parties have consented to the filing of this brief.

INTRODUCTION[2]

This appeal concerns an important issue of religious liberty. The question is whether Missouri may deny a religious daycare and nursery school participation in a program providing rubber pellets made from recycled tires to schools for use under playground equipment to prevent injury to children. Missouri's program was created for the neutral nonreligious purpose of making playgrounds safer for children and keeping old tires out of Missouri landfills.

Trinity Lutheran Church of Columbia, Inc. (Trinity Lutheran), applied to participate in Missouri's program so its nursery school playground would be safer. Everyone agrees the grant would have been awarded but for the fact that the applicant was a church. But, because Trinity Lutheran's nursery school is operated by a church, Missouri would not authorize the grant to provide rubber pellets for Trinity Lutheran's playground. Missouri refused to let Trinity Lutheran participate in this program pursuant to the first clause of Article I, § 7, of Missouri's constitution.

Sara Parker Pauley is Director of the Missouri Department of Natural Resources (DNR) Solid Waste Management Program. The federal district court granted DNR's motion to dismiss because it "conclude[d] that *a Missouri court* addressing this issue *would find* that when a state complies with the directive in clause one of Section 7 (no aid to religious organizations), it does not violate the second clause

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[2] We adopt the Statement of the Case provided by Petitioner in its opening brief, filed April 14, 2016, pp. 3-10.

(discrimination against religion)." *Trinity Lutheran Church of Columbia* v. *Pauley*, 976 F. Supp.2d 1137, 1141 (W.D. Mo. 2013) (emphasis added). Trinity Lutheran appealed the district court's decision to the Eighth Circuit, and an Eighth Circuit panel affirmed, with Judge Gruender concurring in part and dissenting in part. See *Trinity Lutheran Church of Columbia* v. *Pauley*, 788 F.3d 779, 790 (8th Cir. 2015), reh'g denied August 11, 2015.

HISTORICAL BACKGROUND

As a result of the Missouri Compromise Maine was admitted as a free state in 1820 and Missouri as a slave state in 1821. The Missouri Constitution of 1820, adopted in territorial convention in St. Louis (and subsequently approved, with amendments, by Congress), included provisions concerning the separation of church and state.[3] For example, a provision prohibited members of the clergy from holding public office.[4]

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[3] "That no person, on account of his religious opinions, can be rendered ineligible to any office of trust or profit under this state; that no preference can ever be given by law to any sect or mode of worship; and that no religious corporation can ever be established in this state." Mo. Const. 1820, Art. XIII, § 5.

[4] "No person while he continues to exercise the functions of a bishop, priest, clergymen, or teacher of any religious persuasion, denomination, society, or sect, whatsoever, shall be eligible to either house of the general assembly; nor shall he be appointed to any office of profit within the state, the office of justice of the peace excepted." Mo. Const. 1820, Art. III, § 13. This Court later held such restrictions on political participation by clergy to violate the First Amendment. *McDaniel* v. *Paty*, 435 U.S. 618 (1978) (plurality opinion) (provision in Maryland constitution that

Missouri adopted its second constitution in 1865 directly after the Civil War. The Constitution of 1865 was influenced by the polarized politics of the Radical Republicans. The dominant issues surrounding the drafting and adoption of the Constitution of 1865 involved emancipation of former slaves, the ability of state officials suspected of being disloyal to the Union to continue in office, and the desire to disenfranchise those who served the Confederacy or sympathized with its cause.[5] The disenfranchisement was accomplished by requiring all individuals to swear an oath affirming they had always been loyal to the Union. The 1865 Constitution further declared a person could not practice law, serve on a corporate board, or serve in any capacity as a clergyman without signing the oath.[6]

A Catholic priest, Father Cummings, refused the oath and challenged Missouri's ability to require it. This Court invalidated the oath requirement in *Cummings* v. *Missouri*.[7]

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disqualified clergy from holding public office violates First Amendment).

[5] See Dennis W. Belcher, *The Judicial Ouster Ordinance of 1865 and Radical Reconstruction in Missouri*, in Kenneth H. Winn, ed., *Missouri Law and the American Conscience* (2016), pp. 88-89.

[6] *Id.* at 89.

[7] 71 U.S. (4 Wall.) 277 (1872) (priest cannot be deprived of right to function as cleric for refusal to take exculpatory oath, as the provision was a bill of attainder and *ex post facto* law).

The 1865 Constitution adopted additional church-state separationist measures, discriminatory by present standards. Ironically, for example, the constitution's "Declaration of Rights" prohibited churches from owning more than five acres of land in rural areas and more than one acre in a town or city, and it voided any sale or gift of real estate in excess of these amounts to any minister, preacher, or religious sect.[8]

In 1875, Missouri again convened a constitutional convention and approved a provision requiring the Missouri legislature to appropriate 25% of the general revenue to support public schools.[9] Public education in the nineteenth century was "unabashedly patriotic and unmistakably Protestant." John C. Jeffries and James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 297-98 (2001). Public, or "common," schools "featured Bible reading, prayer, hymns, and holiday observances ****." *Id.* To counter Catholic initiatives to obtain a share of tax money for Catholic schools, public school advocates promoted "least-common-denominator Protestantism," where King James Bible reading[10] in public school became the "basis for a pan-Protestant compromise, a vague and inclusive Protestantism that, when augmented by specific doctrinal instruction at Sunday school, proved

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[8] The application of a similar law in Illinois, one restricting churches to ownership of no more than ten acres, was eschewed by this Court in *Gilmer* v. *Stone*, 120 U.S. 586 (1887) (interpreting the discriminatory restraint so as not to be applicable).

[9] Mo. Const. 1865, Art. I, §§ 12-13.

[10] The King James translation was not recognized by the Catholic Church.

acceptable to all. Thus, the "instruction behind [school] doors was nondenominational but emphatically not secular." *Id.* at 299.

"American public education was religious but *nonsectarian*." *Id.* at 299 (emphasis added). The "swirling" anti-Catholic sentiments at the time "came to a point in controversies over the public schools. Catholic educational separatism challenged the Protestant vision of a Christian America. Protestants responded by trying to keep Bible reading in the public schools and to interdict funding of *sectarian* education." *Id.* at 303-04 (emphasis added). For the latter half of the nineteenth century, the Protestant position was that "public schools must be '*nonsectarian*' (which was usually understood to allow devotional Bible reading and other Protestant observances), but public money must not support '*sectarian*' schools which in practical terms meant Catholic." *Id.* at 301 (emphasis added).

James G. Blaine, Republican Senator and Congressman from Maine,[11] proposed amending the U.S. Constitution to prevent "any religious sect" from controlling public primary and secondary education and preventing public funds from being given directly to "religious sects or denominations."[12] The Blaine

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[11] Blaine was a Congressmen at the time but went on to be Senator from Maine, Secretary of State, and Republican candidate for president, losing to Grover Cleveland in 1884.

[12] H.R. Joint Res. 1, 44th Cong., 1st Sess. (Dec. 14, 1875). The Blaine Amendment provided:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no

Amendment passed the House but failed in the Senate. Supporters of the Blaine Amendment, however, worked to have the States adopt similar provisions in state constitutions.

Even as Blaine was proposing his amendment to the United States Constitution, Missouri was adopting a similar amendment to its 1875 Constitution. Article I, § 7, of Missouri's current constitution provides:

> [Cl. 1] That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister, teacher thereof, as such; and
>
> [Cl. 2] that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.[13]

Article IX, § 8 of Missouri's constitution provides:

> Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an

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money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

[13] Originally Art. II, § 7 of the Missouri Constitution of 1875. The first clause has been described as the "no-aid" clause, and the second clause is called the "no-discrimination" clause.

> appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.[14]

In 1945, Missouri voters called a constitutional convention by initiative and a new state constitution was adopted. The 1945 constitution – which is the current Missouri constitution – retained the foregoing provisions from the 1875 constitution.

SUMMARY OF ARGUMENT

The Eighth Circuit's opinion turned on a novel and controversial interpretation of Article I, § 7, of Missouri's constitution. No Missouri court had ever reconciled the two clauses in Article I, § 7. This Court counsels federal courts when confronted with a novel issue of state law to avoid declaring state law and abstain, allowing state courts to interpret state law.

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[14] Originally XI, § 11 of Mo. Const. of 1875.

See *Erie Railroad*,[15] *Pullman*,[16] and *Arizonans for Official English*.[17]

The panel majority erred by failing to follow this Court's abstention jurisprudence. Thus, the panel's decision should be vacated and the case remanded with directions that the district court abstain so that this important provision of Missouri's Constitution can be interpreted by a Missouri state court. It may be that, by abstaining and allowing Missouri courts to interpret this provision of Missouri's constitution, the federal courts can avoid having to address various federal constitutional claims.

The Eighth Circuit likewise erred as to the merits. The majority applied *Locke* v. *Davey*, 540 U.S. 712 (2004), too broadly such that it is inconsistent with the Free Exercise Clause. Should this Court reach the merits, Judge Gruender's dissent provides the correct analysis. Specifically, the panel majority misconstrued Trinity Lutheran's pleading as a facial challenge, instead of an as-applied challenge, to Art. I, § 7; and it misapplied the free exercise and antiestablishment principles set forth in *Luetkemeyer* v. *Kaufmann*,[18] and *Locke*.

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[15] *Erie R. Co.* v. *Tomkins*, 304 U.S. 64 (1938).

[16] *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941).

[17] *Arizonans for Official English* v. *Arizona*, 520 U.S. 43 (1997).

[18] 364 F. Supp. 376 (W.D. Mo. 1973), summarily aff'd, 419 U.S. 888 (1974).

ARGUMENT

I. This appeal turns on a novel issue of Missouri state law that should be resolved in the first instance by Missouri courts.

A. This Court's jurisprudence in *Erie*, *Pullman*, and *Arizonans* counsels lower federal courts to avoid declaring novel issues of state law.

Federal courts should abstain from making novel declarations of state law. *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941). This Court has provided three reasons for *Pullman* abstention: first, the avoidance of needless friction with state policy makers;[19] second, reduction of the likelihood of erroneous interpretations of state law by federal judges;[20] and third, constitutional avoidance – avoiding unnecessary federal constitutional rulings when the matter can be resolved under state law.[21] As we explain below, all three of these considerations are present here. Federal courts may raise abstention on their own motion, including on appeal. *Bellotti* v. *Baird*, 428 U.S. 132, 143 n.10 (1976).

We are also mindful of the current vacancy on the Court. An equally divided affirmance of the Eighth Circuit's decision would leave Missouri law unsettled. By vacating the panel's decision and remanding with

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[19] *Pullman*, 312 U.S. at 500.

[20] *Id.* at 499-500.

[21] *Id.* at 501.

directions to order the district court to abstain from deciding a Missouri constitutional issue, this Court could avoid engendering further confusion by affirming the split-decision of the Eighth Circuit.

Indeed, the Eighth Circuit panel believed the district court should have abstained from deciding the unsettled issue of Missouri law, but inexplicitly, the majority went on to review the district court's decision of this important and novel state law issue on the merits. The panel stated:

> This inversion of the theories pleaded *distracted the district court from a very serious issue* – after dismissing the federal claims, should the court have declined exercise its supplemental jurisdiction over a state law claim that is based on an *important provision of the Missouri Constitution* and turns on the proper interpretation of *rather ambiguous* Supreme Court of Missouri precedents? *We think that question should have been answered affirmatively*, but we will nonetheless review the district court's dismissal of this claim on the merits.

Trinity Lutheran,788 F.3d at 786 (emphasis added).

B. The Eighth Circuit panel premised its decision upon a novel interpretation of Missouri constitutional law.

Trinity Lutheran brought five counts. *Trinity Lutheran*, 788 F.3d at 782. Four counts alleged violations of the Free Exercise Clause, Establishment Clause, Free Speech Clause, and Equal Protection Clause. The fifth count was a supplemental claim

alleging intentional discrimination on the basis of religion in violation of Missouri Constitution, Art. I, § 7, cl. 2. *Id.* Although a part of the Missouri Constitution since 1875, the no-discrimination clause has *never* been interpreted in a reported opinion by *any* Missouri state court.[22] DNR relied exclusively upon the first clause of Article I, § 7, to deny Trinity Lutheran the grant to obtain rubber pellets for its playground.[23] *Trinity Lutheran*, 788 F.3d at 782, 790.

For all practical purposes, DNR admits that it intentionally discriminated against Trinity Church solely because it was a church. Discrimination against Trinity Lutheran is a violation of the no-discrimination clause in Art. I, § 7, clause 2. DNR argues, however,

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[22] The "no-discrimination" clause of Mo. Const. Art. I, § 7, along with other statutory and constitutional provisions, was invoked, not as an original claim but as a point on appeal in a child-custody dispute where the trial judge was accused of preferring the parent who had not converted to the Jehovah's Witnesses. See *Waites* v. *Waites*, 567 S.W.2d 326, 333 (Mo. 1978) ("Judges should not even give the appearance of such preference or favor."); see also *id.* at 331 n.2.

[23] When DNR wrote Trinity Lutheran to tell Trinity Lutheran the DNR was denying Trinity Lutheran's application, DNR did not rely on Mo. Const. Art. IX, § 8. Art. IX, § 8 is inapplicable. The provision applies only to schools, and a preschool or day-care center is not a school. The Missouri Department of Social Services licenses preschools and day-care centers. They are social service providers. In contrast, K-12 schools are accredited by the Missouri Department of Elementary and Secondary Education. Schools are schools, not social service providers. Preschools and day-care centers may help to prepare a child for school (as well as provide custodial care in a parent's absence, often at her place of employment), but they are not themselves schools.

that its intentional discrimination is excused – if not compelled – by the no-aid clause, Art. I, § 7, cl. 1. Specifically, DNR relied on the text, "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church *** as such." DNR's argument casts the two clauses of Art. I, § 7, into unnecessary conflict.

These clauses do not conflict; more on this below. But assuming a conflict, both the district court[24] and the majority of the circuit panel said that the conflict should be "harmonized" by *subordinating* clause 2 to clause 1. *Trinity Lutheran*, 788 F.3d at 786 ("if granting Trinity Church's application would have constituted 'aid' to a church prohibited by the first clause *** then denying the grant was not a discriminatory action prohibited by the second clause"). Subordination is not harmonization. Rather, it is downgrading the importance of one coordinate clause to another, all without supplying any principled rationale for doing so. On what principle can a federal court say that a no-aid clause is more important than a no-discrimination clause? This is surely plain error. And if a federal court engages in a balancing of state policy (clause 2 is subordinate to clause 1), the court is doing precisely what this Court said a federal judge must not do. Avoiding the need for federal courts to engage in this type of state policymaking is why this Court adopted its *Pullman* abstention jurisprudence.

Clause 1 and clause 2 of Art. I, § 7, are part of Missouri's Bill of Rights. As a canon of construction they ought to be read, if at all possible, so as not to

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[24] *Trinity Lutheran*, 976 F. Supp.2d 1137, 1141.

conflict. See Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (2012), p. 180 ("there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously").

There are various ways that the two clauses can be reconciled. By its plain language, the DNR rubber-pellets-for-playgrounds program is secular in purpose and content, to wit: the use of recycled tires to provide a safer surface for children on a playground while disposing of old tries that otherwise would go to a landfill. The rubber pellets did not go to a "church *** as such," meaning to a "church *** as a church," but went to a preschool operated by a church. If a preschool *qua* preschool is considered a proper object of aid, then such a construction, pursuant to the "surplusage canon," gives meaning to the limiting words "as such" at the end of clause 1. See Scalia & Garner, ch. 26.[25] Moreover, the grant was not "money *** from the public treasury *** as such," but rubber pellets from recycled auto tires.

Then there is the question of what is "in aid of" a church? On that question, Trinity Lutheran has argued a *quid pro quo* theory. 788 F.3d at 786. We agree with that argument, but we also ask whether "in aid of" means something explicitly religious, such as support for prayer, worship, classes in religion, sacred books as opposed to a secular-purpose of creating safer playgrounds and keeping old tires out of state landfills. Stated differently, is there a difference between the

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[25] "If possible, every word and every provision is to be given effect (*verba cum effecto sunt accipienda*). None should be ignored."

state giving rubber pellets made from old tires and giving Bibles or hymnals? Rubber pellets have absolutely nothing to do with the sectarian mission of a religious institution. But Bibles, hymnals, copies of the Koran, or prayer rugs further a sectarian purpose. If the phrase, "in aid of," is read as the Eighth Circuit suggests, fire departments could not put out a fire in a church building (or church nursery school). Similarly, under the majority's view, police officers could not direct traffic for an Easter or Yom Kippur service at a church or synagogue.

Under this Court's Establishment Clause jurisprudence, programs of aid, made available without regard to the religious character of the provider, are upheld.[26] Moreover, a virtue of this narrower meaning of the term "in aid of" is that tension with the Free Exercise Clause rule of no-intentional-religious-discrimination is avoided.[27]

The no-discrimination clause could also be understood as applicable only to intentional discrimination, not disparate-impact cases.

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[26] A program of direct secular aid to K-12 schools, including religious schools, was found not to violate the Establishment Clause in *Agostini* v. *Felton*, 521 U.S. 203 (1997), and again in *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (plurality). See also *Bowen* v. *Kendrick*, 487 U.S. 589 (1988) (upholding program of direct secular aid to social service providers, including religious providers).

[27] This Court's rule prohibiting intentional discrimination on account of religion is stated in *Church of the Lukumi* v. *Hialeah*, 508 U.S. 520 (1993), following the same rule stated in *Employment Div.* v. *Smith*, 494 U.S. 872 (1990).

Our point is not, "How should these questions of Missouri Constitutional law ultimately be resolved, including reconciling Art. I, § 7, clause 1 with clause 2?" Rather, our point is that the answers should and must come in the first instance from a Missouri state court.

This case entails an important political and policy question, one for Missouri state officials not the federal judiciary. It is well known that inner-city public education is a failure.[28] Missouri experiences this problem in the City of St. Louis and Kansas City. Other states are innovating with school-choice legislation. In addition to state educational vouchers in Ohio,[29] income tax deductions for educational expenses in Minnesota,[30] and tax credits for contributors to nonprofit student scholarship funds in Arizona,[31] sister states are adopting innovations to improve K-12 education and enhance parental choice.[32]

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[28] See, e.g., Robert D. Putnam, *Our Kids: The American Dream in Crisis* 135-90 (2015).

[29] *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002).

[30] *Mueller* v. *Allen*, 463 U.S. 388 (1983).

[31] See *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436 (2011).

[32] See, e.g., *Duncan* v. *State*, 166 N.H. 630, 102 A.3d 913 (N.H. 2014) (school choice program); Florida (tax credit scholarship program, Fla. Stat. § 1002.395); Nevada (student educational savings accounts, <http://dailysignal.com/2015/06/02/nevada-becomes-fifth-state-to-enact-groundbreaking-education-savings-accounts/>); and North Carolina (student opportunity scholarship grants).

All these states have Blaine Amendments, but for now the reforms are proceeding. The aim is to rescue inner-city students. The Eighth Circuit's decision will halt such educational reform efforts in Missouri. *Pullman* abstention exists to prevent such preemption of state policy decisions by the federal judiciary.

II. The Eighth Circuit wrongly concluded *Luetkemeyer* v. *Kaufmann* and *Locke* v. *Davey* were controlling.

A. *Luetkemeyer* is not controlling.

The panel opinion below held that this Court's summary affirmance in *Luetkemeyer* v. *Kaufmann*, 419 U.S. 888 (1974), summarily aff'g, 364 F. Supp. 376, 383-84 (W.D. Mo. 1973), was binding on the Eighth Circuit and required judgment for DNR. See 788 F.3d at 783-84. The panel wrote:

> [W]hile the parameters of the Supreme Court's summary affirmance in *Luetkemeyer* may not be free from doubt, given the issues addressed in the dissent from summary affirmance, we conclude that the Court necessarily decided that Article I, § 7, of the Missouri Constitution is *not* facially invalid.[33]

This statement is wrong for multiple reasons.

First, contradictory to the panel's claim, the pleading of Trinity Lutheran was not a facial attack on Art. I, § 7. Trinity Lutheran brought an "as applied" challenge to the DNR denial of Trinity Lutheran's

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[33] *Id.* at 784 (emphasis in original).

application to participate in the rubber pellets for playgrounds program administered by DNR. This program did not, on its face, exclude preschools operated by churches. Trinity Lutheran's lawsuit challenged only DNR's denial of the church's application to participate in the program. As such, Trinity Lutheran's burden was only to show that the grant program was unconstitutional as applied to Trinity Lutheran.

The majority, inexplicably, leapt to the notion that Trinity Lutheran was bringing a facial challenge to the first clause of Art. I, § 7. *Trinity Lutheran*, 788 F.3d at 83. This is incorrect. Federal Rule of Civil Procedure 8(e), requires pleadings "must be construed so as to do justice" to the parties. Judge Gruender noted the majority's error. *Id.* at 791 (Gruender, J., dissenting in part).

Second, *Luetkemeyer* does not stand for the rule, as the panel claimed, that Art. I, § 7, was constitutional in a challenge under the Free Exercise Clause. That line of reasoning would have a provision in a state constitution preempting an individual's otherwise admitted right to relief under the Free Exercise Clause. Such a rationale turns the Supremacy Clause, U.S. Const. Art. VI, § 2, on its head.

Widmar v. *Vincent*, 454 U.S. 263 (1981), rejected a similar argument. In *Widmar* a state university complied with strict separationist provisions in Missouri's constitution. But this Court held Missouri's state constitutional provisions did not override the Free Speech Clause of the First Amendment. *Id.* at 275-76. It must be admitted, of course, that in a proper case an individual's federal constitutional right to be free of a

state's overt religious discrimination can be overridden by a showing of a compelling government interest achieved by the least restrictive means. But the mere presence of a state's policy preference embedded in its constitution cannot equate, *ipso facto*, with the state successfully satisfying its heavy burden of overcoming strict scrutiny review.

Third, *Luetkemeyer* stands for a far more modest proposition than that stated by the panel below. That is, a state may, consistent with the Free Exercise Clause, choose to provide free bussing only for students attending public schools, notwithstanding that there are children in the state that wish to attend private schools, including private religious schools. The rule is entirely sensible and is the law today. What a state cannot do, consistent with the Free Exercise Clause, is to provide free bussing for students attending public schools and those attending private nonreligious schools, without providing bussing for students attending religious schools. It is the latter, a question not reached by this Court's summary affirmance in *Luetkemeyer*, that is presented, in another form, in this case.[34]

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[34] The panel claimed support for its reading of *Luetkemeyer* in *Brusca* v. *State of Mo. ex rel. State Bd. of Educ.*, 405 U.S. 1050 (1972), summarily aff'g, 332 F. Supp. 275 (E.D. Mo. 1971). See 788 F.3d at 784. *Brusca*, however, stands for the far more limited principle that Missouri may, consistent with the Free Exercise Clause, provided free education to students attending public schools but not to students attending private schools, including students in private religious schools.

B. *Locke* v. *Davey* is not controlling.

Judge Gruender explained the panel's fundamental error:

> When the *Locke* Court spoke of a substantial antiestablishment concern, I seriously doubt it was contemplating a state's interest in not rubberizing a playground surface with recycled tires.

Trinity Lutheran, 788 F.3d at 793 (Gruender, J., dissenting).

The panel majority relied on *Locke*. See 788 F.3d at 785, 785 n.3. In doing so, the panel committed three errors.

First, the panel majority read *Locke* as excusing a violation of what would otherwise be overt religious discrimination prohibited by the Free Exercise Clause, not because the nature of the aid was religious but because the recipient of the aid was a church. *Second*, the panel read *Locke* as sometimes allowing "indirect" aid but not "direct" aid. Subsequent decisions no longer support this distinction. *Third*, the panel fixated on the metaphor in *Locke* that the Free Exercise and Establishment Clauses are in "tension," and thus the question is whether Missouri's (in the panel's view) rubber pellets for playgrounds program falls safely "within the play in the joints" between the two Religion Clauses.

As we show below, "tension" or conflict between the Free Exercise Clause and the Establishment Clause is not possible. Of course, a conflict can occur between the Free Exercise Clause and a state's constitution,

such as a Blaine Amendment. And that is the case here, with the consequence that Missouri state law, as applied, is preempted by the Free Exercise Clause of the United States Constitution. Indeed, such conflicts occur with regularity. See, e.g., the cases discussed above of *Widmar* v. *Vincent*, 454 U.S. 263 (1981) (Missouri Constitution); *McDaniel* v. *Paty*, 435 U.S. 618 (1978) (plurality opinion) (Maryland constitution); *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1872) (Missouri Constitution); cf. *Gilmer* v. *Stone*, 120 U.S. 586 (1887) (Illinois statute).

1. The panel majority reads *Locke* too expansively.

Permission for a state to withhold aid to a college student pursuing a degree in devotional theology to be a minister of the Gospel bears no similarity to a non-sectarian program to use old tires to make playgrounds safer. *Church of the Lukumi* v. *City of Hialeah*, 508 U.S. 520 (1993), is controlling. The Free Exercise Clause does not permit DNR to intentionally discriminate against Trinity Lutheran because it is a church.

Judge Gruender was correct that the majority over-reads *Locke*.[35] See, e.g., *Colorado Christian University* v. *Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008) (discussing the scope of *Locke* v. *Davey* in opinion by McConnell, J., a recognized national expert in religious liberty and now a law professor at Stanford University). See also Thomas C. Berg and Douglas

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[35] Compare 788 F.3d at 785 (majority) with *id.* at 791-92 (Gruender, J., dissenting in part).

Laycock, *The Mistakes in* Locke *v.* Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 Tulsa L. Rev. 227 (2004). Judge Gruender correctly noted that Trinity Lutheran had properly stated a claim based on the Free Exercise Clause's prohibition on intentional discrimination because of religion. 788 F.3d at 793.

Locke involved what has been characterized as "indirect" aid, whereas the DNR solid waste program is "direct" aid.[36] This is now a distinction without a difference. This Court has since upheld both "indirect" and "direct" programs-of-aid, provided that they are administered without regard to the religious character of the charitable or educational providers in the grant program.

This Court first upheld the constitutionally of an "indirect" form of aid to religion in *Mueller* v. *Allen*, 463 U.S. 388 (1983) (parental state income tax deduction for expense of enrolling child in K-12 school, including religious school, does not violate Establishment Clause). Later "indirect" aid programs, in chronological order, are *Witters* v. *Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (vocational rehabilitation aid for blind used to attend religious school does not violate Establishment Clause); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (federal legislation providing interpreter to student attending school, including religious school, as part of special education program does not violate

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[36] Justice O'Connor has straightforward definitions of "indirect" and "direct" aid in *Mitchell* v. *Helms*, 530 U.S. 793, 843 (1988) (O'Connor, J., concurring in the judgment).

Establishment Clause); and *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002) (voucher plan to attend school of student's choice, including a religious school, does not violate the Establishment Clause).

With respect to programs where the nature of the aid is "direct," the first such modern case[37] to uphold a program was *Bowen* v. *Kendrick*, 487 U.S. 589 (1988) (federal program awarding grants to counseling centers, including religious centers, did not violate Establishment Clause). Later decisions are *Rosenberger* v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995) (state university program to encourage student writing via publication of newspapers, including religious newspapers, did not violate Establishment Clause);[38] *Agostini* v. *Felton*, 521 U.S. 203 (1997) (federal program providing special education teachers at schools, including religious schools, did not violate the Establishment Clause); and *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (plurality opinion) (federal Primary and Secondary Education Act providing aid to K-12 schools, including religious schools, does not violate the Establishment Clause).

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[37] A pre-modern case, but one that nonetheless upheld a direct aid program to construct college buildings on a religious campus, is *Tilton* v. *Richardson*, 403 U.S. 672 (1971) (plurality opinion in part) (federal program of construction grants for secular-use buildings at colleges, including religious colleges, does not violate Establishment Clause). See also *Bradfield* v. *Roberts*, 175 U.S. 291 (1899) (federal funds to construct religious hospital does not violate Establishment Clause).

[38] The shift from pre-modern to modern neutrality theory was unmistakable when *Agostini* reversed *Aguilar* v. *Felton*, 473 U.S. 402 (1985).

There are, of course, limits imposed by the Establishment Clause to such funding and other forms of aid when administered by religious service providers. Care must be taken that the program has controls such that funds are not diverted to religious "indoctrination." *Mitchell*, 530 U.S. at 836, 857-66 (O'Connor, J., concurring in the judgment, joined by Breyer, J.).[39] Likewise, the nature of the aid must not be "inherently religious," such as worship, proselyting, or devotional Bible reading. *Kendrick*, 487 U.S. at 605. As it happens, the rules preventing diversion have been worked-out in considerable detail. A congressional statute enacted in 1996, 42 U.S.C. § 604a, took the lead (for grants awarded according to neutrality theory, no direct aid "shall be expended for sectarian worship, instruction, or proselytization"). This was followed by two Executive Orders, one issued by President George W. Bush and one by President Barack Obama.[40] Together, the legislation and executive orders authorized the promulgation of multiple sets of regulations by various federal departments under the

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[39] In *Mitchell* (plurality opinion), the Court upheld a general federal program providing educational materials to K-12 schools, public and private, secular and religious, allocated on a per-student basis. Because *Mitchell* was a plurality opinion, Justice O'Connor's concurring opinion, *id.* at 836 (joined by Breyer, J.), is controlling because it worked the lesser alteration to the prior law. See *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (when Supreme Court fails to issue a majority opinion, the opinion of the members who concurred in the judgment on the narrowest grounds is controlling).

[40] President Bush's Executive Order 13279 was issued in December 2002. It was amended by President Obama's Executive Order 13559.

heading of "Equal Treatment Regulations,"[41] and overseen, *inter alia*, by The White House Office of Faith-based and Neighborhood Partnerships.[42]

These modern cases allowing aid to grant recipients, including religious recipients, is consistent with the original meaning of church-state relations in the U.S. Constitution. For that meaning this Court most often looks to the Virginia experience between 1776 and 1786 for guidance. See Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776-1786*, 7 Geo. J. of L. & Pub. Pol'y 51-103 (2009).

In *Rosenberger* v. *Rector & Visitors*,[43] Justice Souter and Justice Thomas squared off with respect to the Virginia experience, in particular the meaning of the defeat of Patrick Henry's Assessment Bill. In a separate opinion concurring in the Court's decision, Justice Thomas argued that the defeat of the bill

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[41] Almost a dozen departments and agencies recently publish final regulations for federal social service programs when it comes to religious freedom principles for treatment of faith-based social service providers and their beneficiaries. See https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-07339.pdf (April 4, 2016).

[42] Concerning church-state issues and religious freedom, these matters are overseen by the White House Office of Faith-Based and Neighborhood Programs. See <https://www.whitehouse.gov/administration/eop/ofbnp/values>.

[43] 515 U.S. 819 (1995) (holding that state university's denial of student activity funds to pay for printing of student newspaper with specifically religious perspective as part of a limited public forum to enlarge student writing was viewpoint discrimination contrary to Free Speech Clause).

supported the "nonpreferentialist" position with respect to the meaning of the Establishment Clause.[44] This school of thought argues that, although the Establishment Clause does not permit the government to prefer some religions over other religions, the clause does permit government to support religion so long as all religions are treated equally.

On the other hand, in dissent Justice Souter argued the defeat of the Assessment Bill supported his view that the Establishment Clause means government can never aid religion, not even when the aid program is equally available to a large class of providers with none excluded because of their religious character.[45] If Justice Souter's dissenting view was correct, money from the student activity fees in *Rosenberger* could not be used to defray the cost of printing the student religious newspaper. No aid is no aid, insisted Justice Souter, regardless of the resulting discrimination within the university-created forum based on the religious content of the plaintiff's newspaper.[46]

The historical record does not support either of these two interpretations of the defeat of Henry's Assessment Bill.[47] First, Henry's bill, as amended and engrossed on December 24, 1784, and then tabled until

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[44] *Id.* at 855-56 (Thomas, J., concurring).

[45] *Rosenberger*, 515 U.S. at 868-69, 872 n.1 (Souter, J., dissenting).

[46] *Id.* at 870-76 (Souter, J., dissenting).

[47] The narrative that follows in the text is drawn from Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776-1786*, 7 Geo. J. of L. & Pub. Pol'y 51-103 (2009).

the next General Assembly which was to convene in October 1785, was a special or "earmarked" tax. The assessment was for funding only the activities described in the bill (clergy salaries and church buildings), as opposed to appropriating monies from a general tax that was to be paid into the state treasury.

This Court has twice ruled that there is no burden on religious conscience with respect to a general tax the monies of which are paid into the general treasury.[48] Unlike a general tax that is paid into the treasury without conditions directing how the money is later used, a special earmarked tax has the required causal link between the extraction of the tax from the taxpayer and the monetary support of religion. The "tax" in *Rosenberger* (i.e., student activity fees) was like a general tax payment into the treasury, not like Henry's tax earmarked for religion.

Second, Henry's bill was amended to deal with the contingency where a taxpayer paid his assessment but neglected (or refused) to designate the Christian minister or church to receive the money. These undesignated monies were to be held in a separate account and later applied to "seminaries of learning" (schools) operating within the county where the undesignated tax money was collected. The bill needed to instruct officials what to do with these undesignated

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[48] This Court has twice rejected taxpayer claims brought under the Free Exercise Clause because of the absence of religious coercion to the taxpayer. See *Tilton* v. *Richardson*, 403 U.S. 672, 689 (1971) (holding taxpayers lacked the requisite burden on religion to pursue free-exercise claim); *Central Bd. of Educ.* v. *Allen*, 392 U.S. 236, 248-49 (1968) (same).

monies. This amendment was added by pro-assessment forces to give the bill an even broader appeal. The option gave taxpayers more choices, especially for those who did not associate with any Christian church. Perhaps the taxpayers were Jewish, perhaps they were Christian but not affiliated with a local church, or perhaps they were of no religion.

Contrary to what Justice Souter assumes, however, the use of the undesignated tax monies for schools did not turn Henry's bill into the modern-day equivalent of a "neutral" program of aid to education available to a broad array of schools without regard to religion. With respect to the relatively small amount of undesignated tax money, the funds could only be used for "seminaries of learning." But in Henry's bill the nature of these schools was unclear. In Virginia between 1784 and 1785, there was no public school system. To the extent there were schools (as opposed to home education by tutor), they were mostly church-affiliated, likely Protestant.[49] Justice Thomas is correct that the special fund created by the undesignated assessments awaited future legislation by the Virginia General Assembly with respect to how the monies were to be appropriated.[50] There is no reason to assume that these undesignated monies would go to a "neutral" mix of secular and religious schools. Because Henry's bill did not create a "neutral" program of aid to schools

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[49] *Rosenberger*, 515 U.S. at 853 n.1 (Thomas, J., concurring) (citing authorities).

[50] *Id.* (noting that under the terms of the Assessment Bill undesignated tax monies could fund schools operated by a religious organization).

chosen without regard to religion, the bill's defeat cannot be read as a rejection of modern neutrality theory.

Third, Henry's Assessment Bill funded all Christian churches. An attempt to have the bill fund all religious groups was defeated. Thus the proposed assessment was not non-preferentialist, and thereby the defeat of the bill was not a defeat of non-preferentialism. It cannot be said that Henry's bill would have passed if only the assessment had been available to Jews, Muslims, Hindus, Buddhists, and Scientologists. Rather, the principle reason Henry's bill was defeated was the opposition believed it was best for religion and best for the body politic if support for religion was voluntary, not compulsory.

There are legitimate inferences to be drawn from the defeat of Henry's bill. The Protestant dissenters and James Madison, would have opposed the bill regardless of whether undesignated tax monies went to a special school fund. That is consistent with the central argument of the many petitions from those objecting to the tax. Moreover, the immediate follow-up to the defeat of Henry's bill was the passage of Jefferson's Bill for the Establishment of Religious Liberty. The operative paragraph of that bill codified what had de facto taken place over the last ten years, namely, Virginia's defunding of the Anglican Church. The unifying idea behind both the defeat of Henry's bill and the passage of Jefferson's was that support for religion should be voluntary – which is to say, not by the government. And the rationale was two-fold: to protect religion from government corrupting the church by bending her ministry to objectives set by the state;

and, that denying governmental cognizance over religious questions was best for unifying the body politic, which in turn bode well for sustaining the fledging republic.[51]

That still leaves the question: What did the opponents to Henry's bill regard as government-funded religion? The bill's opponents clearly regarded a special earmarked tax for clergy salaries and church buildings to be government support for religion. But would general treasury funds appropriated for science, math, and reading classes in K-12 schools, funded on a per student basis without regard to the religious or secular character of the organization operating the school, be regarded as support for religion? Based on the defeat of Henry's bill, we honestly cannot say. We hasten to add that the Court ought not to be troubled by the failure of the Virginia experience to answer the issue in *Rosenberger* (arising 210 years later). It is sufficient that we know the general principle to come out of the Virginia disestablishment experience is voluntarism. The rest is just so much detail left for others to answer as questions arose down the road

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[51] It was believed that for government to take sides in disputes over creeds, doctrine, and other forms of specific religious observance was to dangerously risk dividing the body politic just at the moment when unity was most needed. Hence, for example, the germ of an idea at the founding was that religious tests for public office were bad for civic peace, as were civil courts attempting to resolve disputes over religious doctrine. See, e.g., U.S. Const. Art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."); *Watson* v. *Jones*, 80 U.S. 679 (1871) (no civil court jurisdiction to resolve disputes over religious doctrine, polity, or church discipline).

concerning the principle's particular application. As already recorded above, this Court has since supplied that detail in a string of cases, all of which flesh-out the meaning of voluntarism: *Mueller*, *Witters*, *Zobrest*, *Zelman*, *Kendrick*, *Rosenberger*, *Agostini*, and *Mitchell*.

2. The Free Exercise and Establishment Clauses are not "frequently in tension."

The Eighth Circuit relied on *Locke*, and *Locke* quoted with approval a metaphor to the effect that the Free Exercise and Establishment Clauses are "frequently in tension." 540 U.S. at 718. Thus its assignment, as the Court saw it, was to determine if Missouri Const. Art. I, § 7, fell safely in the narrows where "'there is room for play in the joints' between the Clauses" and thus there remained space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause. *Id.* The metaphor contemplates that the free-exercise and no-establishment principles run in opposite directions, and indeed will often conflict. It is as if the metaphor envisions free-exercise as pro-religion and no-establishment as, if not anti-religion, then at least tasked to hold religion in check. Such a view – wrongheaded, as we point out below – places the nine Justices in the power seat, balancing free-exercise against no-establishment, in whatever manner a 5 to 4 majority deems fair and just on any given day. Such unguided balancing accords maximum power to the Court (or worse, power to one "swing" justice), while trenching into the power of the elected branches.

For the "tension" fallacy, *Locke* cited *Tilton* v. *Richardson*, 403 U.S. 672, 677 (1971) ("Numerous cases considered by the Court have noted the internal

tension in the First Amendment between the Establishment Clause and the Free Exercise Clause."). *Tilton*, in turn, relied on *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668-69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."), which is where this fallacy got its start.

Let it be noted that this "tension" fallacy was wholly dicta, not necessary for reaching the decision in *Walz*, *Tilton*, or *Locke*. So correcting the "tension" fallacy will not change the result in any of these cases, but will do a world of good to clarify how to think rightly about the Religion Clauses.

The view that the First Amendment's text, free-exercise and no-establishment, are frequently in tension, and at times in outright war with one another, is quite impossible. The full powers of the national government are both enumerated and limited, an original understanding later made explicit in the Tenth Amendment.[52] When ratified in 1791, the Bill of Rights did not vest more power in the national government.

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[52] The narrative in the text is drawn, with citation to authorities, from Carl H. Esbeck, *The First Federal Congress and the Formation of the Establishment Clause of the First Amendment*, 208-51, in T. Jeremy Gunn & John Witte, Jr., eds., *No Establishment of Religion: America's Original Contribution to Religious Liberty* (Oxford 2012), and Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 Utah L. Rev. 489, 508-24 (2011) (Federalist and Anti-Federalist maneuvering concerning the absence of a bill of rights in the 1787 Constitution).

Rather, the fears of the Anti-Federalists, who were prominent in the First Congress, drove them to just the opposite objective: to deny to the new central government the power to interfere with essential liberties (for example, speech, press, civil jury trial) that might otherwise be implied from the more open-ended delegations of power in the Constitution of 1787 (e.g., Commerce Clause and the Spending Power).

The Federalists, in turn, gave little resistance to this enterprise because their position all along was that the national government had not been delegated such powers in the first place. Indeed, James Madison, a Federalist at this time in his career and the principal theorist behind the 1787 Constitution, led the charge for a Bill of Rights. The Federalists harbored a different anxiety, namely, to avoid a second constitutional convention as sought by Patrick Henry and others favoring increased state sovereignty. Adding a Bill of Rights would sap whatever popular support Henry had behind his effort. So Congress settled on the text of the proposed articles of amendment in mid-September 1789 with little more than the usual give and take. Twelve articles were submitted to the states, but only ten were ratified. The successful articles (numbers three through twelve) were thought to alter very little the status quo, but the Bill of Rights did calm the anxieties of many citizens over the centralization of national power, all while serving as a useful hedge against possible future government encroachments.

Most pertinent for present purposes is that each substantive clause in the first eight amendments (the Ninth and Tenth read as truisms) was designed to

anticipate and negate the assumption of certain powers by the national government – a government already understood to be one of limited, enumerated powers. Thus, for example, the free-speech provision in the First Amendment further limited national power – or, from the Federalists' perspective, merely made clear that the central government had never been delegated power to abridge freedom of speech in the first place. Likewise, the free-press provision further limited national power. These two negations on power – the speech and press clauses – can reinforce one another but they cannot conflict. Simply put, it is impossible for two denials of power to conflict. Similarly, the free-exercise provision further restricted national power and the no-establishment provision likewise restrained national power. These two negations – the Free Exercise Clause and the Establishment Clause – can overlap and thereby doubly deny the scope of permissible governmental action, but they cannot conflict.[53]

It is easy enough to envision how this works out in practice. Consider a young Muslim enrolled in the fourth grade of a public school. Her teacher begins the classroom day by having the students stand next to

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[53] Quite apart from the theoretical impossibility of "tension," the idea defies common sense. The clauses-in-conflict fallacy would attribute to the drafters, the founding Congress of 1789-90, the error of placing side by side two constitutional clauses that work to cancel one another. That is just too implausible to be taken seriously. Further, if it was possible for them to conflict, then how is a court to choose which is controlling? Why not choose free exercise over Non-establishment? Is one clause of the Constitution more important than the other? It all makes no sense; no sense, because the clauses cannot conflict.

their desks and recite together the Lord's Prayer. Our student, along with her parents, sue alleging a violation of the Free Exercise Clause. After the exchange of appropriate motions and argument, a federal district court concludes that the plaintiff's conscience is burdened and thus the Free Exercise Clause is violated. The relief granted, however, is an order permitting our Muslim fourth grader to remain seated and silent while the daily prayer exercise continues involving the teacher and other students. Our Muslim student, along with her parents, again sue, this time alleging a violation of the Establishment Clause. After the exchange of appropriate motions and argument, the federal district court concludes that the Establishment Clause is violated. This time the relief ordered is that the prayer exercise is suspended entirely for all the students.

The two Religion Clause compliment, both providing relief, but they do not – and cannot – conflict. If two other students in the classroom, along with their parents, now sue alleging that their right to religious liberty is denied because of the discontinuance of the prayer, this third complaint will be dismissed. Paraphrasing *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203, 225-26 (1963), the district court will explain that the right to religious freedom does not extend to a right to capture the engines of government, and put its machinery to work for you to better practice your faith.

Locke needs correcting when it said, following dicta in *Tilton* and *Walz*, that the Free Exercise Clause can conflict with the Establishment Clause and vice versa. The two clauses can, on rare occasions overlap and complement one another, but they can never conflict.

CONCLUSION

This Court should vacate the decisions below and remand with directions to abstain from reaching the state constitutional claim.

In the alternative, this Court should reverse the decision below relying on an overly expansive reading of *Locke* v. *Davey*, and find that Missouri Const. Art. I, § 7, as applied, violated Trinity Lutheran's rights under the Free Exercise Clause.

Respectfully submitted,

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RECORD AND BRIEF

No. 15-577

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR,
MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The National Education Association ("NEA") is a nationwide organization of some three million education professionals, the vast majority of whom are employed by public school districts, as well as colleges and universities, throughout the United States. In furtherance of its goal of "great public schools for every student," NEA has worked actively to ensure that public education is not undermined by ill-considered "voucher" programs that undercut equitable education opportunities by diverting public-school funding to sectarian and other private schools. State constitutional provisions like Missouri's Article I, § 7, through which the people of that state have determined that public funds should not be used to pay for religious education and other forms of religious exercise, have been interpreted to protect against attempts to use public funds for such purposes. NEA has consistently advocated for that result and has opposed attempts to use the federal Constitution to nullify these state constitutional guarantees of religious liberty. This Court rebuffed such efforts over a decade ago in *Locke v. Davey*, 540 U.S. 712 (2004), and NEA submits this brief in opposition to current attempts to undermine state constitutions by limiting the Court's holding in *Locke* to its specific facts.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party, nor any person other than *amicus curiae*, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner has granted blanket consent to the filing of *amicus* briefs, and Respondent has given written consent to the filing of this brief.

SUMMARY OF ARGUMENT

Missouri's interpretation of Article I, § 7 of its constitution as prohibiting the state from making a grant to the Petitioner church under its scrap tire program is consistent with a broad tradition under which the state courts have interpreted provisions of their state constitutions more expansively than this Court has construed analogous provisions of the federal Bill of Rights. Particularly over the last forty years, the states have looked to their own constitutions as independent guarantors of individual rights, which the state courts have increasingly construed on the basis of state-specific considerations rather than as mere reflections of analogous federal provisions. This development has been particularly pronounced with respect to public funding of religion, where state constitutional provisions guaranteeing freedom of conscience and separation of church and state typically have different historical origins and markedly different language from that found in the federal First Amendment. Thus, many state courts have departed from this Court's Establishment Clause precedents in construing their state constitutions to prohibit public funding of religion in ways that would be permissible under the Establishment Clause.

This Court's decision in *Locke v. Davey* stands for the proposition that states may do so, in order to vindicate their own anti-establishment interests, without running afoul of the federal Free Exercise or Equal Protection Clauses. Petitioner's attempt to limit *Locke* to its specific facts involving the training of clergy would effectively substitute a uniform federal standard regarding public funding of religion for the

states' ability to determine, under their constitutions, whether their citizens' tax payments should be used to support religion. More specifically, it would be a serious error for the Court to decide this case on the basis of Petitioner's argument that it involves nothing more sectarian than shredded tires. Although this Court has generally held the Establishment Clause to permit "purely secular" aid to religious institutions, many state courts have reached a different result under their state constitutions – including in cases involving public funding of bus transportation for students attending religious schools, secular textbooks for students at such schools, or construction of secular facilities at church-related colleges. Holding that the federal Constitution bars the states from prohibiting public funding of religious organizations through such aid that is secular in nature would effectively overrule decades of decisions in which the state courts have sought to ensure religious liberty under the provisions of their state constitutions.

ARGUMENT

In a seminal article nearly forty years ago, Justice William J. Brennan, Jr., called attention to what has become one of the most important developments in American jurisprudence in recent decades – the re-emergence of state constitutional law as a source of individual rights separate and independent from the federal Constitution. Thus, Justice Brennan noted in 1977 that "more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased." William J. Brennan, Jr., *State Consti-*

tutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 495 (1977). The construction of state constitutional provisions independently of their federal analogues has, in the intervening years, only become more firmly established as a fundamental principle of constitutional law in many of the states.

This trend toward independent construction of state constitutions has found particular traction with regard to state constitutional protections of religious liberty. In this area, the state constitutional provisions often are cast in language quite different from, and more focused than, that of the federal First Amendment. In many cases – particularly with regard to the issue of public funding of religion – the state courts have construed their constitutional provisions in a manner that is more protective of religious liberty than what this Court has held to be mandated by the federal Establishment Clause. In *Locke v. Davey*, 540 U.S. 712 (2004), this Court found that the federal Constitution left "room for play in the joints," *id.* at 718, such that the states were not limited, either by the Free Exercise Clause or the Equal Protection Clause, to following the lead of this Court and the federal Constitution in determining how firmly to draw the line of separation between church and state.

The dozen years since *Locke* was decided have seen repeated efforts to eviscerate that decision, and thus to weaken state constitutional religion clauses, by limiting *Locke* to the specific facts upon which it was decided. This case, in which the Court has agreed to assess one such argument, will thus be of critical importance for the ability of state courts to continue to construe the religious liberty clauses of their state

constitutions in a manner independent of this Court's interpretation of the First Amendment.

Amicus NEA submits this brief in order to emphasize to the Court the history of the states' independent interpretation of their own constitutional protections of individual rights – both generally, and more specifically with regard to state constitutional guarantees of religious liberty and freedom of conscience that restrict the use of public funds to support religion. In a variety of contexts, many state courts have interpreted their state constitutional provisions governing separation of church and state in ways that depart from – and in many instances refuse to follow – the results that this Court has reached, and the interpretive methods it has applied, in construing similar questions under the federal Establishment Clause. Adopting the reasoning of Petitioner and its *amici* would effectively nullify long lines of state court decisions, replacing state courts' independent interpretation of their own religion clauses with a uniform federal standard for public funding of religion. Doing so would serve neither the interests of federalism nor of religious liberty.

I. STATE CONSTITUTIONAL LAW IS AN INDEPENDENT GUARANTOR OF FUNDAMENTAL RIGHTS, INCLUDING RELIGIOUS LIBERTY

A. The State Courts Have, in the Last Four Decades, Recognized State Constitutions as Independent Sources of Individual Rights

Like the Constitution of the United States, the constitutions of each of the several states contain provi-

sions protecting the rights of individual citizens vis-à-vis their government. Although these state constitutional declarations of rights typically overlap with much of what is found in the first ten amendments to the federal Constitution, they are – as a historical matter – not derivative of the federal charter. Instead, "[f]ar from being the model for the states, the Federal Bill of Rights was added to the Constitution to meet demands for the same guarantees against the new central government that people had secured against their own local officials." Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379, 381 (1980). And indeed, as new states joined the union and wrote their own constitutions, these states "took their bills of rights from the preexisting state constitutions rather than from the federal amendments." *Id.* Until well into the twentieth century, moreover, these state constitutional provisions had been the *only* protection of individual rights against state authorities. *See, e.g.*, *Massachusetts v. Upton*, 466 U.S. 727, 738-39 (1984) (Stevens, J., concurring).

The incorporation of many portions of the federal Bill of Rights into the Fourteenth Amendment – thus making them applicable to the states – led, however, to a period during which state constitutional provisions protecting individual rights tended to be treated as merely duplicative of their counterparts in the federal Constitution. Incorporation thus "led many state courts and the lawyers who practice before them to ignore the state's law, enforcing only those personal rights guaranteed by federal law, or to assume that the state's own guarantees must reflect whatever the United States Supreme Court finds in their federal

analogues." Linde, 9 U. Balt. L. Rev. at 382. Indeed, as late as 1980, Justice Hans Linde of the Oregon Supreme Court could observe that "today, most state courts look to interpretations of the Federal Bill of Rights for the meaning of their own state constitutions, in the rare cases when they consider them at all." *Id.* at 382-83.

That is no longer the case. By 1992, when it struck down a judicial gag order as incompatible with the state constitution, the Supreme Court of Texas was able to point to some 600 published opinions during the previous two decades in which state courts had "relied on state constitutional grounds to provide protections broader than federally interpreted guarantees under the United States constitution." *Davenport v. Garcia*, 834 S.W.2d 4, 12 n.21 (Tex. 1992); *see also, e.g., Arnold v. City of Cleveland*, 616 N.E.2d 163, 168 (Ohio 1993) (joining the "noticeable trend ... among state courts," which are "increasingly relying on their constitutions when examining personal rights and liberties").[2]

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[2] Apart from these state court decisions themselves, the doctrinal framework for this renewed reliance on state constitutional law has been developed in a series of scholarly articles by state court justices and judges. *See, e.g.*, Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 St. John's L. Rev. 399 (1986); Stanley G. Feldman & David L. Abney, *The Double Security of Federalism*, 20 Ariz. St. L.J. 115 (1988); Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 Valparaiso Univ. L. Rev. 427 (1996); Herbert P. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 Suffolk U. L. Rev. 887 (1980); Stewart G. Pollock, *State Constitutions as Separate Sources of fundamental Rights*, 35 Rutgers L. Rev. 707 (1983); Robert F. Utter,

Many of these state court decisions have emphasized not only that the state constitution may provide broader protection for individual rights, but that state constitutional provisions should be interpreted *independently* rather than as a function of their federal counterparts. Under this "primacy" approach, the Florida Supreme Court explained that,

> when called upon to construe their bills of rights, state courts should focus primarily on factors that inhere in their own unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law.

Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992). *See also, e.g., State v. Jewett*, 500 A.2d 233, 236-37 (Vt. 1985) (interpretation of state constitution should be based on, *inter alia*, historical and textual analysis of the state constitution, as well as consideration of sibling state decisions involving identical or similar clauses); *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991) (similar).

Under this view, "[t]he proper sequence is to analyze the state's law, including its constitutional law, be-

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State Constitutional Law, The United States Supreme Court, and Democratic Accountability, 64 Wash. L. Rev. 19 (1989); Sandra D. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 Wm. & Mary L. Rev. 801 (1981); Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 Sw. L.J. 951 (1982); Linde, 9 U. Balt. L. Rev., *supra*.

fore reaching a federal constitutional claim." *Sterling v. Cupp*, 625 P.2d 123, 126 (Or. 1981). And, in doing so, "[t]he right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand." Hans A. Linde, *E Pluribus – Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 179 (1984).[3]

Numerous state court decisions have emphasized the importance of such independent interpretation even where the state constitutional provision is one that closely tracks a federal provision. As the Indiana Supreme Court put it, "[t]he Indiana Constitution has unique vitality, even where its words parallel federal language," so that "[w]hen we interpret language in our state constitution substantially identical to its federal counterpart, 'we may part company with the interpretation of the Supreme Court of the United States or any other court based on the text, history, and decisional law elaborating the Indiana constitutional right.'" *Wallace v. State*, 905 N.E.2d 371, 378 (Ind.

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[3] To be sure, not all state courts have adopted the same approach to their state constitutions. Some, for example, continue to look first to the federal Constitution, turning to the state counterpart only where they "have found the federal analysis unpersuasive, either because we deemed it flawed, ... or because of distinctive state characteristics, ... or because of undeveloped federal analogs." *State v. Gomez*, 932 P.2d 1, 7 (N.M. 1997) (adopting "interstitial" approach); *State v. Lessary*, 865 P.2d 150, 154 (Haw. 1994) ("We will only extend the double jeopardy protections of the Hawai'i Constitution, however, if we find that the protections afforded by the United States Constitution are not adequate.").

2009). And, while "an examination of related federal precedent may be useful as part of the state constitutional analysis," it is "not as binding authority, but as one form of guidance." *Edmunds*, 586 A.2d at 895.

Even where a state court previously has held a state constitutional provision to be "coextensive" with its federal counterpart, these courts nonetheless have often recognized that they "have the authority and, when necessary, duty" to construe the state constitutional language independently rather than following the decisions of this Court wherever they lead. *Doe v. State*, 189 P.3d 999, 1004-05 (Alaska 2008) (declining to follow this Court's changed interpretation of federal ex post facto clause, notwithstanding earlier holding that it was "coextensive" with the state provision). And, as the New York Court of Appeals put it, "[a]n independent construction of our own State Constitution is particularly appropriate where a sharp or sudden change in direction by the United States Supreme Court dramatically narrows fundamental constitutional rights that our citizens have long assumed to be part of their birthright." *People v. Scott*, 593 N.E.2d 1328, 1342 (N.Y. 1992).

This movement among the state courts to construe their state constitutions independently of the federal Constitution has, if anything, only been encouraged by this Court and by individual Justices. Justice Brennan's 1977 article "has been regarded as the Magna Carta of state constitutional law," Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L. Rev. 707, 716 (1983), and any number of opinions by the Court itself have echoed that "a state court is entirely free to read its

own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982); *see also, e.g.*, *California v. Greenwood*, 486 U.S. 35, 43 (1988) (same); *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983) (outlining how state courts should make clear that a decision rests on state constitutional grounds); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (acknowledging state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"); *Massachusetts v. Upton*, 466 U.S. at 735 (Stevens, J., concurring) (admonishing state court for committing an "error of a ... fundamental character" by "rest[ing] its decision on the Fourth Amendment to the United States Constitution without telling us whether the warrant was valid as a matter of [state constitutional] law").

B. Many State Courts Have Construed the Religious Liberty Provisions of their State Constitutions Differently from this Court's Interpretation of the First Amendment

1. Virtually all of the states' constitutions contain one or more clauses guaranteeing, in some form, freedom of conscience and separation of church and state. Few of these state constitutional provisions parallel the federal First Amendment in either text or history. Nearly all of them were written, at least initially, at a time when the First Amendment was not under-

stood to apply to the states, so that it was these state constitutional provisions that set the limits on the extent to which state authorities could use public funds to support religious activity.

Most of the state religion clauses that restrict the use of public funds are of one or the other of two types. First, approximately half of the states' constitutions contain a so-called "compelled support" clause. Typical is the Vermont Constitution, which provides "that no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience." Vt. Const. ch. I, art. 3. Language of this type first appeared in Pennsylvania's 1776 Constitution, and its origins date back to that state's 1682 Frame of Government. *See Chittenden Town Sch. Dist. v. Department of Educ.*, 738 A.2d 539, 556 (Vt. 1999) (tracing the language adopted by Vermont in 1777); *Locke*, 540 U.S. at 723. The prohibition against compelled "support" has generally been held to include compelling citizens to support religious organizations through their taxes. *See, e.g., Embry v. O'Bannon*, 798 N.E.2d 157, 161 (Ind. 2003); *Almond v. Day*, 89 S.E.2d 851, 858 (Va. 1955); *Opinion of the Justices*, 616 A.2d 478, 480 (N.H. 1992); *Knowlton v. Baumhover*, 166 N.W. 202, 207 (Iowa 1918); *Chittenden*, 738 A.2d at 550.

A second common type of religion clause, contained in the constitutions of more than two-thirds of the states, prohibits the use of public funds "in aid of" or "for the benefit of" religion and religious institutions. The Colorado Constitution, for example, contains the following detailed prohibition:

> Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.

Colo. Const. art. IX, § 7. Such "no aid" clauses were, for the most part, added to state constitutions – or incorporated in the constitutions of newly admitted states – during the last half of the nineteenth century, at a time when the developing movement for free, secular public education intersected with increasing opposition to the diversion of public school funds to sectarian schools. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 646-47 (1971) (opinion of Brennan, J.); *see generally* Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & Pol. 65 (2002).[4]

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[4] These no-aid clauses are sometimes referred to – often pejoratively – as "Blaine Amendments," after a failed federal constitutional amendment of 1876. Petitioner and a number of its *amici* have joined a chorus of organizations promoting public funding of religious education which, over the last two decades, have mounted a campaign to discredit these nineteenth century constitutional amendments as the product of "the virulent anti-Catholic animus that dominated American domestic politics in the decade following the Civil War." Br. for Douglas County

2. Because both the text and the history of these state constitutional provisions differ markedly from that of the First Amendment, state courts have, if anything, been even more amenable to interpreting them independently of the federal Constitution than in the case of due process, search and seizure, or other provisions that often track the federal Constitution more closely. As the Indiana Supreme Court has explained:

> Clearly, the religious liberty provisions of the Indiana Constitution were not intended merely to mirror the federal First Amendment. We reject the contention that the Indiana Constitution's guarantees of religious protection should be equated with those of its federal counterpart and that federal jurisprudence therefore governs the interpretation of our state guarantees.

City Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443, 446 (Ind. 2001). Thus, in assessing the extent to which public funds may be used

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Sch. Dist. *et al.* at 27; *see also* Ptr. Br. at 43 ("bigotry"; "hostility to the Catholic Church and to Catholics in general"); Br. of Institute for Justice at 32 ("steeped in anti-Catholic animus"). This attempt to characterize the "no aid" provisions adopted by many states during the latter half of that century as simply the product of anti-Catholic bigotry rests on historical analysis that is at best shoddy and at worst tendentious. In fact, the nineteenth century debate over the "school question" involved multiple and complex historical threads going back well beyond the rise of nativism, which cannot simplistically be ascribed to "bigotry." *See generally* Br. of Legal and Religious Historians in Support of Respondent; *see also* Feldman, 18 J.L. & Pol. at 92-117 (demonstrating that the "non-sectarian ideal" that motivated the no-aid movement was far broader than simple anti-Catholicism, and that as it succeeded it lost its anti-Catholic coloring).

to support religious endeavors, the state courts have developed a rich body of caselaw construing both "compelled support" and "no aid" provisions in accordance with their own state constitutional doctrine, independently of federal Establishment Clause jurisprudence.

As might be expected, the outcomes of these cases differ from state to state. But many state courts, in a variety of contexts, have interpreted their state constitution religion clauses as providing greater religious liberty protection to taxpayers than does the federal First Amendment (as this Court has construed it), and thus as proscribing more strictly the use of public funds to pay for religious activities.

(a) Thus, for example, while this Court has long held that the Establishment Clause does not prohibit states from providing secular textbooks or bus transportation to students attending religious schools, *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (bus transportation); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (secular textbooks) – on the reasoning that "bus rides have no inherent religious significance," *id.* at 244 – a number of states have reached the opposite conclusion under their state constitutions. *See Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983) (textbooks); *California Teachers Ass'n v. Riles*, 632 P.2d 953 (Cal. 1981) (textbooks); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974) (textbooks); *Gaffney v. State Dep't of Educ.*, 220 N.W.2d 550 (Neb. 1974) (textbooks); *Dickman v. School Dist. No. 62C*, 366 P.2d 533 (Or. 1961) (textbooks); *Epeldi v. Engelking*, 488 P.2d 860 (Idaho 1971) (bus transportation); *Spears v. Honda*, 449 P.2d 130 (Haw. 1968) (bus transportation); *Board of Educ. v. Antone*, 384 P.2d 911 (Okla. 1963) (bus

transportation); *State ex rel. Reynolds v. Nusbaum*, 115 N.W.2d 761 (Wis. 1962) (bus transportation); *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961) (bus transportation); *McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953) (bus transportation); *Visser v. Nooksack Valley Sch. Dist.*, 207 P.2d 198 (Wash. 1949) (bus transportation).

These decisions have been based on reasoning like that of the California Supreme Court in "declin[ing] to follow the rationale of *Allen*":

> [I]t is not the meaning of the First Amendment which is critical to our determination, but section 8 of article IX and section 5 of article XVI of the California Constitution. Those provisions do not confine their prohibition against financing sectarian schools in whole or in part to support for their religious teaching function, as distinguished from secular instruction.

Riles, 632 P.2d at 812. Similarly the Nebraska Supreme Court, in reaching the same result, explicitly rejected reliance on Establishment Clause analysis:

> The standards [under the Nebraska Constitution] are not secular purpose, primary aid, or political divisiveness and state-church entanglement. They are whether there is a public appropriation, whether the grant is in aid of any sectarian or denominational school or college, and ... that any educational institution which receives such aid must be exclusively owned and controlled by the state or a governmental subdivision thereof.

Gaffney, 220 N.W.2d at 553; *accord Fannin*, 655 S.W.2d at 483 (declining to follow *Allen* based on "the much more detailed and explicit proscriptions of the

Kentucky Constitution"); *Epeldi*, 488 P.2d at 865 (unlike the First Amendment, the Idaho Constitution "in explicit terms prohibits any appropriation ... or payment from any public fund, *anything in aid* of any church or to help support or sustain any sectarian school") (emphasis in original); *Visser*, 207 P.2d at 204-05 (refusing to follow *Everson*); *Antone*, 384 P.2d at 912-13 (same).

(b) This Court has also, on more than one occasion, upheld state and federal programs that provide funding assistance to sectarian colleges and universities for the construction of college facilities, as long as those facilities were used only for secular purposes. *E.g.*, *Tilton v. Richardson*, 403 U.S. 672 (1971); *Hunt v. McNair*, 413 U.S. 734 (1973). Again, some state courts have, to the contrary, held that under their state constitutions public funds cannot be used to finance the construction even of purely secular facilities at religious colleges or universities. Just a few years ago, the Kentucky Supreme Court held that a state appropriation to pay for construction bonds to finance the building of a pharmacy school at a Baptist college violated the "no aid" clause of the Kentucky Constitution. *University of the Cumberlands v. Pennybacker*, 308 S.W.3d 668, 673-79 (Ky. 2010). Even though the university had agreed "not to use any of the pharmacy building funds for 'church, sectarian or denominational' purposes," the court held that this pledge "cannot change the character of the institution itself," which was "precisely the type of school referenced" in the constitutional prohibition on the use of public funds "by, or in aid of, any church, sectarian or denominational school." *Id.* at 673.

(c) In the context of private-school vouchers, this Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), upheld against an Establishment Clause challenge the unrestricted public funding of religious education that comes with such programs – declining to follow its 30-year-old precedent in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), which had reached the opposite result on similar facts.[5] In doing so, the *Zelman* Court reasoned that the state was not funding religious education – even though it was paying the cost of a program under which 96% of the participants attended religious schools – because parents were making independent choices of which schools their children would attend with the state-provided vouchers. 536 U.S. at 652-53.

State courts construing their own constitutions, of course, are not bound to apply this Court's "parental choice" rationale. While some state courts have followed this Court's lead, many others – both before and after *Zelman* – have refused to do so. Thus, for example, the Vermont Supreme Court both anticipated the *Zelman* decision and explained why the parental choice argument that proved successful under the First Amendment was not persuasive under Chapter I, Article 3 of the Vermont Constitution:

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[5] The program at issue in *Nyquist* provided tuition reimbursement grants to parents of children attending nonpublic schools, the great majority of which were religious schools. *See* 413 U.S. at 780-89. Rejecting the argument that was subsequently accepted in *Zelman*, the Court declined to find it dispositive "that aid is disbursed to parents rather than to the schools." *Id.* at 781.

> [T]he United States Supreme Court may well decide that the intervention of unfettered parental choice between the public funding source and the educational provider will eliminate any First Amendment objection to the flow of public money to sectarian education. We cannot conclude, however, that parental choice has the same effect with respect to Article 3. If choice is involved in the Article 3 equation, it is the choice of those who are being required to support the religious education, not the choice of the beneficiaries of the funding.

Chittenden, 738 A.2d at 563. Similarly, and more recently, the Arizona Supreme Court rejected *Zelman*'s logic: "For all intents and purposes, the voucher programs do precisely what the Aid Clause prohibits. These programs transfer state funds directly from the state treasury to private schools. That the checks or warrants first pass through the hands of parents is immaterial ...." *Cain v. Horne*, 202 P.3d 1178, 1184 (Ariz. 2009). Numerous other decisions, cited in the margin, are to the same effect.[6]

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[6] *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 471 (Colo. 2015) (plurality op.) ("[T]he CSP awards public money to students who may then use that money to pay for a religious education. In so doing, the CSP aids religious institutions."), *petitions for cert. filed*, Nos. 15-556, 15-557, 15-558 (Oct. 28, 2015); *Bush v. Holmes*, 886 So. 2d 340, 352-53 (Fla. Dist. Ct. App. 2004) (immaterial under Florida no-aid clause that vouchers were made payable to parents who chose the school in which to enroll their children), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006); *Almond v. Day*, 89 S.E.2d 851, 856 (Va. 1955) ("The fact that ... the funds may be paid to the parents or

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As the foregoing discussion should make clear, Missouri's interpretation of its constitution as prohibiting the state from making a grant to a religious institution under its scrap tire program is consistent with a broad tradition under which citizens' religious liberty, as well as other individual rights, are protected by state constitutional law independently of the federal Bill of Rights as it is construed by this Court.

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guardians of the children and not directly to the institutions does not alter their underlying purpose and effect."); *Sheldon Jackson College v. State*, 599 P.2d 127, 132 (Alaska 1979) (striking down tuition grant program even though grants were made to students who conveyed the funds to the private colleges of their choice); *Opinion of the Justices*, 616 A.2d 478, 480 (N.H. 1992) (unconstitutional for school districts to pay partial tuition for parents who sent students to private schools of their choice); *Doolittle v. Meridian Joint Sch. Dist. No. 2*, 919 P.2d 334, 342 (Idaho 1996) (payment of public funds for tuition at sectarian school chosen by parents was contrary to Idaho Constitution); *Opinion of the Justices to the Senate*, 514 N.E.2d 353, 356 (Mass. 1987) (tax deduction for private-school tuition unconstitutional; channeling aid to student rather than school was not dispositive where the effect was indirect aid to private schools); *Hartness v. Patterson*, 179 S.E.2d 907, 909 (S.C. 1971) (rejecting argument that tuition grants "do not constitute aid to the participating schools"); *State ex rel. Rogers v. Swanson*, 219 N.W.2d 726 (Neb. 1974) (tuition grants to students for private colleges of their choice unconstitutional); *Witters v. State Comm'n for the Blind*, 771 P.2d 1119 (Wash. 1989) (use of vocational rehabilitation grant at religious college contrary to state constitution, even though previously upheld under Establishment Clause); *Otken v. Lamkin*, 56 Miss. 758 (1879) (statute that paid students attending private schools their pro rata share of state education funds unconstitutional).

II. MISSOURI'S CONSTITUTIONAL DETERMINATION NOT TO SUPPORT CHURCHES WITH PUBLIC FUNDS SHOULD BE RESPECTED

The State of Missouri, as the Court of Appeals observed, "has a long history of maintaining a very high wall between church and state." *Trinity Lutheran Church v. Pauley*, 788 F.3d 779, 783 (8th Cir. 2015) (quoting *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376, 383-84 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974)). Its constitution contains a "compelled support" clause, Mo. Const. art. I, § 6, as well as "no aid" language found in both the constitution's Bill of Rights, *id.*, art. I, § 7, and its education article, *id.*, art. IX, § 8. The state's refusal to award a scrap tire grant to the Petitioner church is fully consistent with the Missouri Supreme Court's longstanding construction of these anti-establishment provisions as prohibiting the use of public funds to pay the cost of even "secular" aid to religious institutions. *See McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953) (providing bus transportation of parochial school students unconstitutional); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974) (providing textbooks for teachers and students in private schools unconstitutional).

That Missouri may assert its constitution's longstanding anti-establishment interest without running afoul of the federal Free Exercise and Equal Protection Clauses is established by this Court's decision in *Locke v. Davey*, and the Court should affirm the decision below on that basis. In particular, Petitioner's attempt to limit *Locke* to its facts, and specifically to distinguish this case on the ground that the aid that

was denied to the Petitioner church was not in itself of a religious nature, should be rejected.

A. The Court Should Reject Petitioner's Attempt to Limit *Locke v. Davey* to its Specific Facts

In many areas of the law, a state's determination to give greater constitutional protection to individual rights than does the federal Constitution gives rise to no federal constitutional issue: the federal Bill of Rights simply establishes the "floor" standard, which is not infringed if states choose to go beyond it in protecting the same rights. Religion, however, creates more difficult problems, because in many instances there are, at least arguably, individual rights on both sides of an issue. Thus, a state's decision to give greater constitutional protection to its citizens' rights of conscience by determining that they should not be compelled to support religious activities through their tax payments may be countered by the contention that treating religious activities differently than otherwise comparable secular endeavors infringes on rights protected by the Free Exercise or Equal Protection Clauses.

The Court addressed precisely this issue in *Locke v. Davey*, holding that, with regard to the funding of religious activity, a state may "draw[] a more stringent line than that drawn by the United States Constitution," 540 U.S. at 722, and that the "exclusion" of a student pursuing postsecondary education in "devotional theology" "from an otherwise inclusive aid program does not violate the Free Exercise Clause of the First Amendment." *Id.* at 715. Noting the "tension" between the Establishment and Free Exercise Clauses of the

First Amendment, the Court held that "'there is room for play in the joints' between them," so that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718-19 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)). That Washington state could have funded the theological education at issue without infringing the federal Establishment Clause was thus not dispositive of whether Washington could prohibit that funding, pursuant to its own constitution, without running afoul of the Free Exercise Clause.

Holding that the state constitutionally could do so, this Court rejected reliance on the argument – grounded in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) – that the exclusion was "presumptively unconstitutional because it is not facially neutral with respect to religion." 540 U.S. at 720. Applying that "facial neutrality" test to the case before it, the Court held, "would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning." *Id.* Rather than imposing criminal or civil sanctions or otherwise impairing the practice of religion in some way, as in the *Lukumi* cases, here "[t]he State has merely chosen not to fund a distinct category of instruction." *Id.* at 721.[7]

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[7] Notwithstanding the Court's refusal to apply the *Lukumi* "facial neutrality" test to a state's prohibition on public funding of religion, Petitioner and many of its supporting *amici* continue to argue, in reliance on *Lukumi*, that a state may not "discriminate" against religion by refusing to fund religious organizations on the same terms as comparable nonreligious entities. *See, e.g.*, Ptr. Br. at 20 ("this case is akin to *Lukumi*"); Br. for Douglas Cty. Sch. Dist. *et al.* at 22 (excluding "religious people and institutions from receiving otherwise neutral and

The teaching of *Locke* is, in sum, that it is within a state's discretion to determine that, as a matter of state constitutional law, it will not require the state's taxpayers to help pay the cost for a church or other religious organization to carry out its religious mission – whether by funding the training of its ministers (as in *Locke*) or in some other way. Petitioner and its *amici* endeavor to avoid that conclusion by relying on Free Exercise cases,

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generally available aid plainly is 'discrimination on the basis of religion'"); Br. of Becket Fund for Religious Liberty at 2 (citing *Lukumi* for the proposition that "a law may not discriminate on its face"); Br. of Association of Christian Schools International *et al.* at 8-9 (arguing, in reliance on *Lukumi*, that "laws singling out religion for adverse treatment" constitute "discrimination against religion" in violation of the Free Exercise and Equal Protection clauses). But *Locke* makes clear that the federal Constitution – far from flatly prescribing "neutrality" in the sense of evenhanded treatment of religion and nonreligion – in fact *requires* a measure of "discrimination" in the sense of differential treatment. In some contexts that means that the state must treat religion and religious entities more favorably than their secular counterparts. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (exempting religious school from suit under employment discrimination laws). In other contexts, particularly where the issue of public funding is involved, the reverse is true. As this Court explained in *Locke*: "[T]he subject of religion is one in which both the United States and state constitutions embody distinct views – in favor of free exercise, but opposed to establishment – that find no counterpart with respect to other callings or professions." 540 U.S. at 721; *see also id.* at 723 ("religious instruction is of a different ilk"). At least after *Locke*, "opponents [of laws restricting public funding of religious entities] cannot rely on the simple lack of facial neutrality between religion and nonreligion in such laws to establish their unconstitutionality." Laura S. Underkuffler, *Davey and the Limits of Equality*, 40 Tulsa L. Rev. 267, 272 (2004).

including prominently *Lukumi*, that have nothing to do with public funding of religion. But, as is manifest from *Locke*, the states have greater discretion in crafting constitutional rules when it comes to *funding* religion than with regard to other kinds of regulation that may impinge on religious practice. Just as there is a "fundamental divide" "between 'abridging' speech and funding it," *National Endowment for the Arts v. Finley*, 524 U.S. 569, 599 (1998) (Scalia, J., concurring), there is a fundamental distinction between "prohibiting the free exercise" of religion and refusing to fund it. While we would not go so far as to say, with Justice Scalia, that "the First Amendment is inapplicable" on the funding side of that divide, *id.*, it remains the case that a state's refusal to fund religious institutions or religious exercise – even where it funds comparable non-religious endeavors – is something fundamentally distinct from "prohibiting" or even impairing the free exercise of religion.[8]

The contention of Petitioner and its *amici* that *Locke* should be limited to its specific facts and read as a "narrow exception ... based on a unique historical concern" related to the "religious training of

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[8] At least since *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), proponents of public funding for religious programs have regularly invoked the specter that, "[i]f this were impermissible, ... a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair," *id.* at 747, and Petitioner and its *amici* do not neglect this line of argument. *E.g.*, Ptr. Br. at 29. Should any state ever actually prohibit its fire or police departments from responding to emergencies at religious facilities, or disallow the construction of public sidewalks in front of churches, it would not seem difficult to distinguish such services, which are provided to all for the benefit of the entire community, from what is at issue here.

clergy," Ptr. Br. at 35, has no merit – for the reasons one state court recently found persuasive in rejecting a similar attempt to limit *Locke* to its facts:

> Just as there are strong state "antiestablishment interests" in formal prohibitions on using tax funds to support the ministry there are strong state antiestablishment interests in prohibitions on the support of religious establishments such as the "church, sectarian or denominational schools" referenced in Section 189 of our Constitution. *Locke v. Davey* firmly supports our conclusion that the Kentucky Constitution does not contravene the Free Exercise Clause when it prohibits appropriations of public tax monies to religious schools.

Pennybacker, 308 S.W.3d at 680.[9]

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[9] Other courts considering the issue have similarly refused to read *Locke* as no more than a "narrow exception" applicable only to ministerial training. *See, e.g.*, *Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004) (upholding Maine's exclusion of parochial schools from voucher program, and finding "unpersuasive" the attempt "to cabin *Davey* and restrict its teachings to the context of funding instruction for those training to enter religious ministries"); *Anderson v. Town of Durham*, 895 A.2d 944, 958-59 (Me. 2006) (same); *Bush v. Holmes*, 886 So. 2d 340, 362-66 (Fla. Dist. Ct. App. 2004) (en banc) (no federal constitutional issue raised by striking down voucher program involving predominantly religious schools), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006); *Bronx Household of Faith v. Board of Educ.*, 750 F.3d 184, 193-95 (2d Cir. 2014). Indeed, even in the Tenth Circuit case relied on by Petitioner and its *amici*, the court was "disinclined to think that *Locke* is confined to its facts." *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1254 (10th Cir. 2008).

Accepting Petitioner's cramped reading of *Locke* would effectively substitute a uniform federal standard for public funding of religion (except with regard to the "narrow exception" for the training of clergy) for the states' discretion – applying their diverse state constitutional provisions, many of which pre-date the federal Bill of Rights – to determine how and when, if at all, their citizens' tax payments may be spent to finance religion. Doing so would overturn decades of state constitutional decisions that depart from this Court's interpretation of the federal Establishment Clause. *See supra* pp. 14-20 & n.6. It would largely nullify state constitution religion clauses – and the states' sovereign choices on how to draw the line separating church and state – as independent constraints on public funding of religion. As this Court made clear in *Locke*, the federal Constitution does not require that result.

Petitioner's interpretation of *Locke* would instead subject state constitutions to the vagaries of this Court's construction of the federal First Amendment. It is no secret, for example, that this Court reads the Establishment Clause differently today than it did forty years ago with respect to public funding of religious education. *Compare Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 780-89 (1973) (striking down public funding for students to attend religious schools), *with Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding public funding for students to attend religious schools). Under Petitioner's theory, a state's exclusion of religious schools from such public-funding programs, which forty years ago not only would have been *consistent with* but in fact *mandated by* the First Amendment, would now be *impermissible* under the federal Constitution. This potential for change in this Court's interpretation of the

federal Constitution is one more reason why *Locke* appropriately recognized the need for "room for play in the joints," 540 U.S. at 718, rather than subordinating state constitutions to this Court's First Amendment jurisprudence.

B. The States Should Not Be Required to Follow the Federal Model of Allowing "Purely Secular" Aid to Religious Institutions

A state's constitutional determination that taxpayer dollars should not be used to fund religion or religious institutions is a valid "antiestablishment interest[]," *Locke*, 540 U.S. at 722, which merits this Court's respect – and that is so notwithstanding the state's departure from this Court's interpretation of the Establishment Clause by prohibiting public funding of religious institutions even through aid that in itself is secular in nature.

Petitioner would distinguish this case from *Locke* on the ground that Missouri's scrap tire program "is entirely secular from top to bottom," and "[t]he surface that children play on as they enjoy recess is about as far as one can get from the devotional training of clergy." Ptr. Br. at 37. That may be. It is certainly true that there is nothing inherently religious about shredded tires. But it would be a serious error for the Court to decide this case on that basis.

To be sure, the case might be seen as an easier one if the state aid at issue were the payment of tuition for the study of theology (as in *Locke*), or for K-12 children to attend religious schools (as in the school voucher cases cited above, including the *Douglas*

County School District case, *supra* note 6, as to which the petitions for certiorari apparently are being held for this case). In such cases it would be impossible to argue, as does Petitioner here, that the aid itself was "entirely secular."

But this case can be made out as the harder one only by focusing exclusively on the nature of the aid itself, rather than on the nature of the institution that receives the aid. What Petitioner and its *amici* would have the Court ignore is that through this grant the state would not simply be paying for scrap tires; rather, it would be paying part of the cost for a religious institution to conduct its religious mission – here, for a church to operate a "Church ministry," Ptr. Br. at 3, that provides religious instruction to young children. That the state aid takes the form of helping pay for physical facilities the church uses for its school does not change the fact that the state is contributing to the cost of operating the school.

The distinction between public funding that pays for specifically religious activities, and aid to religious institutions that can be and is cabined to secular purposes, is one that this Court has embraced as a basis for upholding public funding of religious institutions under the Establishment Clause. In *Everson*, its seminal public funding case of the modern era, a sharply divided Court upheld a state's provision of bus transportation for students attending religious schools on the ground that – as the Court subsequently put it – "bus rides have no inherent religious significance." *Allen*, 392 U.S. at 244. The Court later explained its reasoning for permitting such "secular" aid to religious institutions in this way:

> Of course, it is true in each case that the provision of such neutral, nonideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsecular areas. But an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law.

Nyquist, 413 U.S. at 775; *see also, e.g.*, *Allen*, 392 U.S. at 244-48 (discussing secular nature of loaned textbooks); *Tilton*, 403 U.S. at 679 ("The Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions."); *Mitchell v. Helms*, 530 U.S. 793, 820 (2000) (agreeing that "the Establishment Clause requires that aid to religious schools not be impermissibly religious in nature").

Even under the Establishment Clause, however, allowing such "secular" aid to religious institutions was highly controversial from the outset, as the multiple opinions in *Everson* attest. *See* 330 U.S. at 18 (Jackson, J., dissenting); *id.* at 28 (Rutledge, J., joined by Frankfurter, Jackson and Burton, JJ., dissenting). And many state courts have refused to follow this Court in construing the often more specifically worded religion clauses of their state constitutions. As the discussion above of state caselaw makes clear, there is a very long history of state courts holding that their state constitutional prohibitions on "aid" to, or of com-

pelled taxpayer "support" for, religious institutions prohibit such aid even where the form of the assistance is, as Petitioner asserts, "entirely secular from top to bottom." Ptr. Br. at 37. Were the Court to adopt the reasoning of Petitioner and its *amici* – and hold that the federal Constitution bars states from prohibiting the public funding of religious institutions where the "aid" or "benefit," like the shredded tire material in this case, is itself secular in nature – the result would be to overrule numerous state court decisions, going back decades, that have struck down aid to religious institutions as in violation of state constitutional provisions, regardless of whether the aid provided was itself of a religious nature or was used for specifically religious purposes. *See supra* pp. 15-17 (citing cases).

Doing so would replace the states' independent interpretations of their own constitutions' religion clauses with a uniform federal standard on public funding of religion, based on this Court's current understanding of the First Amendment – with the attendant damage to the principles of federalism on which our legal system is based. If *Locke v. Davey* means anything, it is certainly that the "room for play in the joints" of the First Amendment does not require this Court, in the name of Free Exercise of religion, to impose on the states the standards at which it has arrived in interpreting the federal Establishment Clause. More specifically, the states should not be compelled to apply the standard adopted by *Everson* and its progeny that permits "purely secular" aid to religious institutions. Instead, the states should remain free, in applying the religious liberty provisions of their own constitutions, to look not only to the nature of the

state assistance itself but also to the nature of the institution that is receiving the assistance, and to reach the conclusion that their constitutions do not allow government to require taxpayers to help pay the costs for a church to carry out its religious mission – even if it is through the provision of facially secular aid like scrap tires.

C. The Missouri Constitution's Prohibition on Funding Religion with Taxpayer Dollars Respects Both the Free Exercise of Religion and Citizens' Freedom of Conscience

Should this Court hold that the federal Constitution does not permit Missouri to prohibit public funding of religious institutions in the form that is at issue in this case, it would not only do lasting damage to principles of federalism, but would also seriously impair the ability of the states to protect principles of religious liberty by giving effect to their "state constitutions [that] are the basic charters of individual liberties." Pollock, 35 Rutgers L. Rev. at 718.

A state constitutional provision that prohibits the use of taxpayer dollars to support religious endeavor in no way evinces "hostility" to religion, as Petitioner would have it. Ptr. Br. at 41. To the contrary; a state's determination that it will not compel its citizens, through their tax dollars, to support financially the religious missions of churches and other religious entities, whose religious teaching they may not accept, demonstrates the greatest respect for the principles of religious liberty on which our country was founded. As much as religion is a part of American life and tradition, public funding of religion is not. Far from

evincing hostility to religion, state court decisions enforcing constitutional prohibitions on public funding of religion "have paved the way for religion to grow and prosper in this land of the free." *Pennybacker*, 308 S.W.3d at 686 (Cunningham, J., concurring). State constitutional provisions like Missouri's that go farther than does the federal Establishment Clause in prohibiting public funding of religion demonstrate only respect – both for believers' exercise of religion free from government entanglement, and for freedom of conscience of those who do not embrace their religious beliefs.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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July 5, 2016

RECEIVED
AND
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No. 15-577

In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR, MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE STATES OF NEVADA, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, LOUISIANA, MICHIGAN, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA & WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.

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INTEREST OF *AMICI CURIAE*

Nevada and other Amici States have a vital interest in protecting the constitutional rights of state residents, whatever their religious beliefs. Consistent with those obligations, the State of Nevada—acting through its Attorney General—is authorized by its citizens to commence, join, or participate in any suit necessary "to protect and secure the interest of the State." Nev. Rev. Stat. § 228.170.

Amici States' interest is particularly acute here. At least three States—Nevada, Colorado, and Missouri—are currently confronted with litigation that raises questions about the limits that the U.S. Constitution imposes on state constitutions' Blaine or No Aid provisions. *See, e.g.*, *Duncan v. Nevada*, No. A-15-723703-C (Nev. D. Ct., Clark Cnty., filed Aug. 27, 2015); *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015), *petitions for a writ of cert. filed*, Nos. 15-556, 15-557, 15-558; *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 778 F.3d 779 (8th Cir. 2015), *petition for a writ of cert. granted*, No. 15-577. State and lower federal courts are split on those limits, and States often find themselves as defendants on both sides of the question.

SUMMARY OF ARGUMENT

This Court, in giving substance to the Religion Clauses, has found more illumination in James Madison's 1784 *Memorial and Remonstrance*[1] than in any other historical document—an exhibition of thought so profound that it was "incorporated not only in the Federal Constitution but likewise in those of most of our States."[2] There Madison opposed Patrick Henry's bill to fund "teachers of Christianity." Not sailors, weavers, and carpenters, but preachers. The question for Madison was whether Virginia should provide a special benefit to churches and churches alone. Some 230 years later, this case asks the opposite question: can a State offer a benefit to everyone *but* churches?

Amici States believe that the severe interpretation of Missouri's No Aid provision—first imposed by the Missouri Department of Natural Resources and then upheld by the Eighth Circuit—countenances unconstitutional discrimination on the basis of religion. To reverse the panel below requires no revolution in Equal Protection or Free Exercise jurisprudence. It simply requires clarifying what the Eighth Circuit panel suspected: that *Locke v. Davey* does not mean

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[1] James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reproduced as* app. II to *Walz v. Tax Comm'n*, 397 U.S. 664, 719 (1970) (Douglas, J., dissenting).

[2] *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 214 (1963). For recent cases citing Madison's *Memorial and Remonstrance*, *see Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 703 (2012); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011).

that simply asserting State "anti-establishment" interests can justify the exclusion of churches, as churches, from neutral, generally available programs.

Church status was the sole basis for Missouri's decision to declare Trinity Lutheran—specifically its preschool and daycare, or "Child Learning Center"—categorically ineligible to apply for the Scrap Tire Program's money. That status was unrelated to the program's purpose in trying to "mitigate" the disastrous "environmental impacts"[3] of the five million scrap tires annually produced by Missourians.[4] Scrap tire dumps burn in fires inextinguishable for months, seep toxic oils into ground water, and breed mosquitos that carry West Nile virus.[5] Nor was church status among the eligibility criteria for grantees, the chief ones being (1) location in Missouri and (2) not causing new environmental harm.[6] This is why program officials, until told, had no reason even to *know* that a "Child Learning Center" was in fact part of a church. Instead, the Department of Natural Resources, when it rejected Trinity Lutheran's application, said it

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[3] Pet. Cert. App. ("App") 86a-89a; Mo. Rev. Stat. § 260.273(6)(2); 10 CSR 80-9.030.

[4] *Scrap Tire and Illegal Dumping Unit—General Information* and video, Mo. Dep't Nat. Res., http://dnr.mo.gov/env/swmp/tires/tirelist.htm (last accessed Mar. 24, 2016).

[5] *Id.*

[6] App. 91a (10 CSR 80-9.030(3)); 154a (church's ranking).

appreciated the church's "candor" in admitting that its daycare-preschool was a church entity.[7]

But if the terms of the program itself were indifferent to church participation, the church was not: it lost a chance at $30,000 in aid. The result is that Missouri in effect refuses to protect children equally from injury because they play at a church. This reversal of Madison's conundrum—instead of a special, religion-only boon, we have a special, religion-only burden—was anticipated by the great Virginian. Madison wrote that Henry's teacher bill "violates equality" by granting to some "peculiar exemptions"—but he added that the very same violation would occur were others subjected to "peculiar burdens."[8]

ARGUMENT

I. *Locke* does not justify the exclusion of churches from the Scrap Tire Program.

Missouri argues that its No Aid provision demands the perpetual exclusion of Trinity Lutheran from eligibility to its Scrap Tire Program and that this No Aid provision serves Missouri's (1) non-endorsement and (2) anti-establishment interests.[9] The Eighth Circuit found that *Locke v. Davey* allowed this action by Missouri. That conclusion was error.

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[7] App. 152a-53a.

[8] Madison, *supra* note 1, at 722.

[9] Mo. Const. art. I, § 7; App. 152a-53a (denial letter).

The *Locke* Court took pains to write a narrow opinion. The "only interest at issue," the Court said, was Washington's interest in "not funding the religious training of clergy,"[10] an interest so rooted in history as to be practically in a class by itself. The Court permitted the exclusion of Joshua Davey from a benefit program because Davey sought a "devotional degree" that was "essentially religious."[11] *Locke*, emphatically, did not say that a State can exclude *all* religious people from *all* benefits programs.

In fact, this was the fear of the late Justice Scalia, who, in dissent, wrote that the opinion could be read to justify exclusion of religion from "public programs in virtually any context."[12] The Court reassured its readers that "[n]othing in our opinion suggests that the State may justify any interest that its 'philosophical preference' commands."[13] The Court simply had a State that had "chosen not to fund a distinct category of instruction." This Court now confronts a State that has chosen not to fund a distinct category of *citizen*.

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[10] *Locke v. Davey*, 540 U.S. 712, 722 n.5 (2004).

[11] 540 U.S. at 721, 725.

[12] *Id.* at 730 (Scalia, J., dissenting).

[13] *Id.* at 722 n.5.

II. The standard of review.

The Court has held that even where there is no "right" to a State benefit, the State "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."[14] This Court has also held that a State cannot "impose special disabilities on the basis of ... religious status."[15] But this brief takes no position on the standard of review, because whether under strict scrutiny or rational basis review, Missouri has not shown *any* defensible interest in excluding the church from its Scrap Tire Program.

III. Missouri's government-speech interest does not satisfy the demands of the Equal Protection or Free Exercise Clauses.

Equal protection of the laws requires that a State treat similarly situated persons similarly unless there is a lawful reason to do otherwise.[16] This means that a classification in a statute cannot be "wholly unrelated" to the statute's objective.[17] Missouri claims that its Scrap Tire Program serves to convert old rubber into a safer environment for all Missourians, from those who live near dump sites to children who fall on softer

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[14] *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

[15] *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990).

[16] *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974).

[17] *Id.*

surfaces.[18] So why is it *relevant* that an applicant for such a grant happens to be a church? Missouri says that giving its money is a "form of government speech" and that giving to a church in particular sends a message of "endorsement" of the church.[19]

This is like saying Missouri's authority to endorse George Washington and disparage Karl Marx means that it can bar all Marxists from eligibility to benefit programs, since even letting them apply would "send a message" that socialism is condoned. A State has ample authority, without going as far as Missouri wishes, to deny a group access to a program's subsidy because the State dislikes the group's message—if the *reason* for the denial is related to the program's "purpose."[20] Missouri can keep a secessionist off the stage at a school program designed to celebrate the Missouri constitution, if failure to exclude would defeat the program's purpose,[21] but the State cannot, without more, block the obnoxious man's kids from public school. Or a church can be made selectively ineligible for a program when its intended actions exceed the program's scope—as where, say, the church intends to

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[18] *Scrap Tire and Illegal Dumping Unit—General Information*, *supra* note 4.

[19] Br. Opp'n Pet. Writ Cert. 4-5.

[20] *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2330-31 (2013); *accord id.* at 2333 (Scalia, J., dissenting).

[21] *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2249 (2015).

lobby despite receiving a non-profit grant[22] or to use an abortion-neutral medical subsidy to advocate for abortion.[23] But without examination of the State's purpose, this Court wrote, there is a "legitimate concern" that the government-speech doctrine could be a "subterfuge for favoring certain private speakers over others based on viewpoint."[24]

Typically the government-speech doctrine protects a State against claims by citizens who feel that the State has, against their will, forced or impeded speech. Here, unconventionally, the State claims that *its* right of speech is threatened at the hands of citizens.[25] But if the Scrap Tire Program is to be likened to those cases where officials promote distinct messages— consumption of beef,[26] park-monument sentiments,[27] or license-plate text and images[28]—then this program's message seems to be that reducing scrap tire is a health-and-safety priority. How is this message altered when it is spread to a church, along with everyone else? It is irrelevant to the program's purpose, or its criteria for choosing

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[22] *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 544 (1983).

[23] *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

[24] *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009).

[25] Br. Opp'n Pet. Writ Cert. 5.

[26] *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005).

[27] *Summum*, 555 U.S. at 476.

[28] *Walker*, 135 S. Ct. at 2249.

awardees, that a participant is a labor union or a facility for the criminally insane. Or if Trinity Lutheran, by participating, *becomes* a conduit for the State's message, how does the church corrupt the message? Trinity Lutheran promised in its Scrap Tire Program application that it would host a playground re-opening ceremony to "publicize the benefits of using recycled materials, especially discarded used automobile tires, to improve our environment."[29] It observed, too, that the new playground would serve as an "excellent learning environment for teaching the children the advantages of recycling."[30]

Possessors of playgrounds of every sort, from private Montessori schools to town parks, all apply to the program for the same reason: to get money to help resurface their playgrounds. (Incidentally, Trinity Lutheran's playground isn't used only by church members; it opens to the public after school, at night, and on weekends.[31]) When the benefit sought has no relation to religion, withholding that benefit from churches alone seems arbitrary and unreasoning. Even the State's speech power is "limit[ed]" by constitutional provisions "outside of the Free Speech Clause."[32] This limit surely arises when a State wields its speech power to deny a church access to a program whose message is wholly unrelated to the church's faith status.

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[29] App. 122a.

[30] App. 123a.

[31] App. 133a.

[32] *Walker*, 135 S. Ct. at 2246.

IV. Missouri's anti-establishment interest does not satisfy the demands of the Equal Protection or Free Exercise Clauses.

1. If Missouri's interest in refusing to "endorse" Trinity Lutheran is insufficient, the next question is whether a general or undefined "anti-establishment" interest supports the department's action. Amici recognize that the desire to disentangle the institutions of organized religion from the institutions of organized power have deep roots in American history.[33] But *Locke* taught that the Court, even when faced with venerable interests, still examines the specific interest asserted and weighs it against the specific burden on the party claiming injury.[34] The decision in *Locke* evaluated the precise purposes behind Washington's desire not to underwrite clergy training[35] and the actual functioning of Washington's program, finding it significant, for instance, that the scholarship allowed for certain theology courses, just not the vocational major in question.[36] The question here is what anti-establishment interest Missouri has in excluding churches specifically from *this* Scrap Tire Program.

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[33] Philip Hamburger, *Separation of Church and State* 479-92 (2002).

[34] *Locke*, 540 U.S. at 717, 724, 725.

[35] *Id.* at 720 n.3.

[36] *Id.* at 717, 724.

First, the program in *Locke*, the Court said, went a "long way toward including religion in its benefits,"[37] which cannot be said for the categorical bar here. Second, the church is similarly situated to every other playground in Missouri. There is no use a church can make of this recycled synthetic, famed for its cushioning and resistance to moisture, that a city park doesn't. The tykes atop the reincarnated tire will use it to run and romp, not sermonize and solicit. Third, the church, by participating in the program, contributes to reduce the number of tires that clog landfills in equal degree with any other playground owner. In sum, the church's religious commitments seem no more relevant than those of hospital administrators providing medical services—which this Court, in *Bradfield v. Roberts*, found no bar to federal money a century ago.[38] The church simply asked for ground-up tires to help it protect playing kids from injury.

The only arguable connection between No Rubber and No Aid is that by improving church property, the church becomes more beneficial to members or more attractive to non-members, or defrays costs to free up cash for religious activity. The initial problem with this rationale is that it wouldn't do if a *federal* environmental agency were making the claim. Anti-establishment concern under the U.S. Constitution arises not from the "divertibility of aid" but because the aid in question has some "inherent religious

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[37] *Locke*, 540 U.S. at 724.

[38] *Bradfield v. Roberts*, 175 U.S. 291, 298 (1899).

significance."[39] So, for instance, geometry books equally useful in public and parochial schools can be lent to the latter, even though in a sense this lending "supports" those parochial schools.[40] In fact, in *Walz*, the Court specifically found no federal establishment problem when a church is treated the same as a "playground."[41] The Court has also said that an anti-establishment interest does not require "cutting off church schools" from things "indisputably marked off from the religious function," like "sidewalks,"[42] a civic feature not all that different from a playground.

Missouri may have the power to make the separation between churches and public money more absolute than the U.S. government does, but Missouri has not offered any reasonable rationale for its exclusion. Nothing in the Scrap Tire Program's purpose or administration evokes classic establishment dangers like social strife, entanglement, or favoritism.

On the other side, there *is* evidence of injury to Trinity Lutheran. The church's projected cost of the work—the cost the Scrap Tire Program would have reimbursed—was $30,580.[43] The price of adherence to

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[39] App. 132a-33a. *See also Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 747 (1976); *McCollum v. Bd. of Educ.*, 333 U.S. 203, 211 (1948).

[40] *Mitchell v. Helms*, 530 U.S. 793, 822-23 (2000).

[41] *Walz*, 397 U.S. at 667 n.1.

[42] *Everson v. Bd. of Educ.*, 330 U.S. 1, 17-18 (1947).

[43] App. 125a.

faith went up by this amount. It's high enough to raise the prospect of a choice between faith and money. Trinity Lutheran presumably could transfer the Child Learning Center to a non-religious nonprofit, who could then carry on, largely as before, the ecumenical work of letting about 90 kids (plus neighborhood friends) play in safety.[44] A law "penalizes" free exercise when it "condition[s] the availability of benefits" on disavowal of one's beliefs.[45] *Locke* found that Washington didn't require its future ministers to "choose" between "religious beliefs and receiving a government benefit."[46] But surely the pressure to choose grows in proportion to (1) the benefit's value and (2) the number of benefit programs on offer.

2. This Court anticipated the Free Exercise problem presented here when the plurality in *Mitchell v. Helms* wrote that "to require exclusion" of religious institutions from a generally available, neutral program would "raise serious questions under the Free Exercise Clause."[47] If the Establishment Clause forbids excessive favoring of religion, the Free Exercise Clause forbids excessive disfavoring of it.[48]

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[44] App. 131a; 133a.

[45] *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *see also McDaniel v. Paty*, 435 U.S. 618, 626 (1978); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

[46] *Locke*, 540 U.S. at 713.

[47] 530 U.S. 793, 835 n.19 (2000).

[48] *Everson*, 330 U.S. at 18; *Walz*, 397 U.S. at 669.

The most instructive Free Exercise case is *McDaniel v. Paty*, which struck a Tennessee law that barred minsters from serving in the legislature.[49] Tennessee asserted a general anti-establishment interest against having the ordained wield raw political power. This interest had once been law in all 13 colonies. But the Court held that this disability, despite the sanction of history, did not relieve the State from "demonstrat[ing] that its views of the dangers of clergy participation in the political process have not lost whatever validity they may once have enjoyed."[50] The point was that *every* anti-establishment interest, even one of the "highest order," as Tennessee claimed, needs a factual basis.[51] Missouri has not articulated such an interest. The members of Trinity Lutheran, like the Tennessee ministers, can still *practice* their faith, but the wrong is in depriving them all of something beyond the mere right of being let alone. On the facts of this case, Tennessee's exclusion of the religious from office, and Missouri's exclusion of the religious from benefits, are constitutionally indistinguishable.

Free Exercise cases after *McDaniel* continued to demand that the State interest, even under rational-basis review, be set out in response to a plausible claim of infringement. In *Lukumi*, it was "protecting the

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[49] *McDaniel*, 435 U.S. at 621.

[50] *Id.* at 628-29; *id.* at 637 (Brennan, J., concurring).

[51] *Id.*

public health and preventing cruelty to animals."[52] In *Locke*, it was "not funding the religious training of clergy."[53] In *Johnson v. Robison*, it was "enhancing military service and aiding the readjustment of military personnel to civilian life."[54] A State, as *Locke* said, cannot simply point to its mere "philosophical preference."[55] Requiring an explanation of the State interest asks little of the State and does little to restrict a State's range of action. After all, a State remains free to "burden" religion—if the State interest is in attacking evils like drug use (*Smith*),[56] harm to children (*Prince*),[57] or unlicensed book sales (*Murdock*).[58] Likewise a State can "benefit" religion—if the State interest is in promoting goods like student safety (*Everson*),[59] better education (*Agostini*),[60] civic

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[52] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538 (1993).

[53] *Locke*, 540 U.S. at 723.

[54] *Johnson*, 415 U.S. at 385.

[55] 540 U.S. at 722 n.5.

[56] *Smith*, 494 U.S. at 890.

[57] *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

[58] *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943).

[59] *Everson*, 330 U.S. at 16-17.

[60] *Agostini v. Felton*, 521 U.S. 203, 232 (1997).

beautification (*American Atheists*),[61] or even contributing to the "pluralism of American society" (*Walz*).[62] Trinity Lutheran's plea is to share in the assistance that Missouri offers to all other groups—for the reason that it, too, like these groups, promotes the State's environmental well-being.

V. The *Locke* confusion harms Amici States.

State courts have read *Locke* to say that State officials, operating within the play in the joints between the Establishment and Free Exercise Clauses, can exclude the religious, as a category, from government programs.[63] Amici here argue only that State anti-establishment interests must be justified by some reasoning that connects the unequal treatment of the religious to the purposes of the program. So long as *Locke* is understood to permit wholesale exclusions of the religious by reference to diffuse, general, or unarticulated anti-establishment interests, States will continue to end up on both sides of two sorts of difficult cases. In some, the State, seeking honestly to apply its No Aid provision, will treat religious organizations and individuals differently—and get sued for differentiating. In other cases, the State will pass a law that makes benefits, like money as part of a school-

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[61] *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 281 (6th Cir. 2009).

[62] *Walz*, 397 U.S. at 689.

[63] *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 351 P.3d 461, 474 (Colo. 2015), *petitions for cert. filed*, Nos. 15-556 (U.S. Oct. 27, 2015), 15-557 (U.S. Oct. 28, 2015), *and* 15-558 (U.S. Oct. 28, 2015).

choice program, available to all, and get sued for *failing* to differentiate.

CONCLUSION

This case does not require the Court to adopt a rule that a State can never justify a categorical exclusion of a church from generally available, neutral benefit programs. It is enough that in *this* case church status was irrelevant to the program's purposes and that in *this* case Missouri offers no supportable basis for its actions. Under the Free Exercise and Equal Protection Clauses, the guiding principle is the same, and Madison, once again, seems to have put it best: the "exclusion" of the faithful, he said, "violate[s] a fundamental principle of liberty by punishing a religious profession with the privation of a civil right."[64]

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[64] *Observations on Jefferson's Draft of a Constitution for Virginia, [ca. 15 October] 1788*, Founders Online, Nat'l Archives, http://founders.archives.gov/documents/Madison/01-11-02-0216 (last accessed Mar. 29, 2016) (reproduction of *The Papers of James Madison*, vol. 11, 7 March 1788–1 March 1789, at 281-295, Charles F. Hobson & Robert A. Rutland, eds., 1977). He said the same when he proposed, as the language that later became the First Amendment, that the "civil rights of none shall be abridged on account of religious belief"). *Amendments to the Constitution, [8 June] 1789*, Founders Online, Nat'l Archives, http://founders.archives.gov/documents/Madison/01-12-02-0126 (last accessed Mar. 29, 2016) (reproduction of *The Papers of James Madison*, vol. 12, 2 March 1789–20 January 1790 and supplement 24 October 1775–24 January 1789, at 196-210, Charles F. Hobson & Robert A. Rutland, eds., 1979).

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RECORD
AND
BRIEFS

No. 15-577

In the

Supreme Court of the United States

TRINITY LUTHERAN CHURCH
OF COLUMBIA, INC.,

Petitioner,

v.

SARA PARKER PAULEY, Director,
Missouri Department of Natural Resources,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner Trinity Lutheran Church.[1] Founded in 1973, PLF is the oldest and most experienced public interest law foundation of its kind. PLF is headquartered in Sacramento, California, and provides a voice for thousands of individuals across the country who believe in limited government, private property rights, individual freedom, and free enterprise. To this end, PLF has participated in many cases involving the Equal Protection Clause, including *Schuette v. Coal. to Defend Affirmative Action Integration & Immigrant Rights & Fight for Equality By Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); and *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

INTRODUCTION AND SUMMARY OF ARGUMENT

Trinity Lutheran Church applied for a grant under the Scrap Tire Program, a government-run program that solicits donations and then offers grants to make playgrounds safer by converting playground surfaces

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

from pea gravel to poured rubber. *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 782 (8th Cir. 2015). The Missouri Department of Natural Resources, which administers the program, believed it was compelled by the state constitution to reject Trinity Lutheran's grant application in favor of less qualified non-religious applicants. *See id.* (citing Mo. Const. art. I, § 7, which provides "[t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion").

Trinity Lutheran challenges the Department's actions under the Free Exercise, Establishment, and Equal Protection Clauses of the federal Constitution. Although courts generally analyze religious liberty claims under the religion clauses, unequal treatment on the basis of religion falls within the purview of the Equal Protection Clause as well. *See generally* Steven G. Calabresi & Abe Salander, *Religion & the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 Fla. L. Rev. 909 (2013). Similarly, although equal protection cases most commonly address discrimination on the basis of race, this Court's equal protection decisions reflect the view that differential treatment on the basis of religion is just as intolerable. *See, e.g., Friedman v. Rogers*, 440 U.S. 1, 17 (1979) ("[D]istinctions such as race, religion, or alienage" are all inherently suspect.).

Moreover, the Court's skepticism of unequal treatment on the basis of religion under the Fourteenth Amendment does not hinge on its disposition of *other* constitutional claims. Rather, an independent analysis is required for each of the constitutional provisions because each protects

different rights: the Free Exercise Clause protects religious beliefs, *see Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 833 (1989), the Establishment Clause mandates government neutrality between religion and non-religion, *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), and the Equal Protection Clause prohibits discrimination based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

An independent analysis of Trinity Lutheran's equal protection claim reveals the constitutional invalidity of the Department's decision to exclude religious entities from the Scrap Tire Program. Because disparate treatment on the basis of religion is subject to strict scrutiny, the burden is on the Department to show that its decision was narrowly tailored to serve a compelling interest. *See Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008). The Department has not met and cannot meet this burden. The decision below should be reversed.

ARGUMENT

I

DISCRIMINATION ON THE BASIS OF RELIGION MUST BE ANALYZED UNDER STRICT SCRUTINY

Although this Court has generally vindicated claims of religious discrimination through the religion clauses, it has never retreated from its repeated assertions that such discrimination would be viewed with as much of a jaundiced eye as racial discrimination under the Equal Protection Clause.

See, e.g., City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (classifications based on religion, race, and alienage are all "inherently suspect distinctions").

It is well-settled that laws that explicitly differentiate on the basis of race are subject to strict scrutiny, the most stringent standard of review. *See, e.g., Johnson v. California*, 543 U.S. 499, 505 (2005). The Court's decisions grouping racial discrimination with religious discrimination strongly imply that strict scrutiny is just as appropriate when reviewing open discrimination of religion. *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 61 (1973) (Stewart, J., concurring) (equating the inherently suspect classifications of race, national original, alienage, indigency, and illegitimacy as unworthy of a presumption of constitutional validity).

Following this Court's lead, the Third, Eighth, and Tenth Circuits treat religious discrimination with the same sort of elevated skepticism with which they treat racial discrimination. The Third Circuit's decision in *Hassan v. City of New York*, 804 F.3d 277, 301 (3d Cir. 2015), is one such example. The New York Police Department Program at issue in that case allegedly monitored Muslims in the City following the September 11th attacks by sending undercover officers into neighborhoods that Department believed to be heavily Muslim. *Id.* at 285. The Third Circuit applied heightened scrutiny to the equal protection claim, noting that "it has long been implicit in the Supreme Court's decisions that religious classifications are treated like others traditionally subject to heightened scrutiny." *Id.* at 299.

The Third Circuit's decision in *Hassan* was hardly groundbreaking. Rather, the circuit court followed this

Court's "decades-long succession of statements" treating religion as a suspect class. *Id.* at 300 (citing, among others, *Armstrong*, 517 U.S. at 464; *Friedman*, 440 U.S. at 17; *United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979)). As the Third Circuit observed, this Court's treatment of religion as a suspect class is just as venerable as the suspect-classification doctrine itself. *Hassan*, 804 F.3d at 299-300. This Court's famous "Footnote Four," which provides the basis for differing standards of judicial review, specified that legislation should "be subjected to more exacting judicial scrutiny" if it is "directed at particular *religious*, or national, or racial minorities." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (emphasis added). The Court's modern equal protection jurisdiction simply extends that protection to members of majority groups. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995) (the standard of review is equal protection cases "is not dependent on the race of those burdened or benefitted by a particular classification").

The treatment of religious discrimination as synonymous with racial discrimination makes perfect sense, given that "religious discrimination in the United States is intertwined with that based on . . . national origin and race." *Hassan*, 804 F.3d at 303. Courts from the early 1900s onward conflated Arabs and Muslims "because of the entrenched belief that Arab and Muslim identity was one in the same." Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U Ann. Surv. Am. L. 29, 34 (2013). As a consequence, government programs that target Muslims have also ensnared Arabs and other people of Middle Eastern descent. *Id.* at 34-35. In *Hassan*

itself, the police allegedly targeted "Muslims by using ethnicity as a proxy for faith." *Hassan*, 804 F.3d at 303 n.15. Thus, treating religious discrimination the same as racial discrimination simply reflects the awareness that religious prejudice is often just racial bigotry by another name.

Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 810, 816 (8th Cir. 2008), is another case in which a court applied strict scrutiny to a claim of unequal treatment on the basis of religion. In *Patel*, a Muslim inmate claimed that the Bureau of Prisons violated the Equal Protection Clause by failing to provide a particular type of Islamic diet. The Court rejected the inmate's claim, because it found that the kosher option offered by the Bureau was compatible with all religious beliefs, and thus did not discriminate at all. *Id.* at 810. Yet the Eighth Circuit left no doubt that a policy that *did* discriminate on the basis of religion would be subject to strict scrutiny because "[r]eligion is a suspect classification." *Id.* at 816.

The Tenth Circuit reached the same conclusion. *See Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1322 n.10 (10th Cir. 2010). The relevant claim in that case, which Plaintiff raised for the first time at oral argument, was that prison officials violated the Equal Protection Clause by failing to provide Muslim inmates with halal meals, but providing kosher meals to Jewish inmates. *Id.* at 1322. The Tenth Circuit denied this Equal Protection claim because the prisoner did not assert it in his pleadings. *Id.* Yet the court suggested a different outcome had the claim been adequately pleaded, because religion is a suspect class. *Id.*

In all, the circuit courts that have addressed religious discrimination under the Equal Protection

Clause have hewed to this Court's unequivocal statements on this issue. Because discrimination on the basis of religion is just as pernicious as discrimination on the basis of race, religious discrimination is analyzed under strict scrutiny, "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

II

STRICT SCRUTINY MUST BE APPLIED TO CLAIMS OF RELIGIOUS DISCRIMINATION INDEPENDENT OF FREE EXERCISE AND ESTABLISHMENT CLAIMS

Trinity Lutheran's equal protection claim must be decided on its own merits; it cannot be resolved by asking whether Trinity *also* has a valid First Amendment claim. That is because the Equal Protection, Free Exercise, and Establishment Clauses are different, and require independent consideration.

Government action may violate the Equal Protection Clause without impinging on a person's rights under the Free Exercise Clause. Justice White's concurrence in *McDaniel v. Paty*, 435 U.S. 618 (1978) illustrates this principle. In that case, an ordained minister challenged a Tennessee law that disqualified him from serving as a delegate to the state's constitutional convention based on his decision to pursue a religious vocation as directed by his beliefs. *Id.* at 621, 643. Tennessee argued that the law was necessary to avoid an Establishment Clause violation, explaining that ministers could inappropriately use their position to promote religion or discriminate against another faith. *Id.* at 628-29. The plurality rejected this rationale, and held that the law violated

McDaniel's First Amendment right to the free exercise of his religion because McDaniel was excluded because of his position as a minister. *Id.* at 627, 629.

Justice White, concurring in the judgment, rejected the majority's reliance on the Free Exercise Clause, and noted he would have invalidated the Tennessee law under the Equal Protection Clause instead. *Id.* at 643 (White, J., concurring). In Justice White's view, the law at issue was perfectly compatible with the Free Exercise Clause, because the law did not interfere with the minister's "ability to exercise his religion as he desires." *Id.* at 644. Yet that conclusion did not end the case. Not only did Justice White conduct an independent analysis of the minister's equal protection claim, he concluded that the claim would have prevailed, because the law unjustifiably prohibited a class of citizens (ministers) from participating in the electoral process. *Id.* at 645 (White, J., concurring). Though Justice White acknowledged the State's legitimate interest in avoiding an Establishment Clause violation, he did not believe banning all ministers from serving as a delegate was an appropriate means, because other states successfully avoided violating the Establishment Clause "without burdening ministers' rights to candidacy." *Id.*

Establishment Clause claims must also be considered separately from Equal Protection Clause claims. The analytical differences required by these two separate constitutional claims are illustrated in *Satawa v. Macomb Cnty. Road Comm'n*, 689 F.3d 506 (6th Cir. 2012). In that case, John Satawa placed a creche on the median of a public road every year at Christmas time. *Id.* at 511. At the urging of the

Freedom from Religion Foundation, Macomb County officials demanded that Satawa remove the creche. *Id.* at 512. The next year, Satawa applied for a permit to display the creche, but the County denied it, fearing a lawsuit based on the Establishment Clause. *Id.* at 512-13. Satawa then sued, and the Sixth Circuit ruled that the County did not violate the Establishment Clause by denying his permit application. *Id.* at 528. Although the court noted that the government was motivated by a faulty understanding of the Establishment Clause, the action of denying the permit did not favor or disfavor religion. *Id.* at 527-28. Thus, there was no violation of the Establishment Clause. *Id.*

The Sixth Circuit court then discussed, without deciding, the Equal Protection claim, which had been dismissed by the trial court on summary judgment. *Id.* at 516. Noting that the county sought to distinguish a permanent monument—a gazebo across the street from the creche—from the temporary display of the creche, the court held that the district court should not have granted summary judgment on the equal protection claim. *Id.* at 528-29. The Sixth Circuit reasoned that treating the creche—a religious symbol—"differently than other items on the median" requires analysis under a strict scrutiny standard, which the County could not satisfy. *Id.* at 529.

For these reasons, this Court should review Trinity Lutheran's Equal Protection claim under strict scrutiny no matter how it decides the First Amendment claims. Under the relevant precedent, including those discussed above, "religion gets Fourteenth Amendment protection in addition to and above and beyond any First Amendment protections

that religion gets under the Establishment and Free Exercise Clauses." Calabresi & Salander, *supra*, at 919.

III

THE DEPARTMENT'S EXCLUSION OF RELIGIOUS ENTITIES FROM OTHERWISE GENERALLY APPLICABLE BENEFITS FAILS STRICT SCRUTINY

In this case, the Department's denial of Trinity Lutheran's grant application is subject to—and fails—strict scrutiny. The *only* reason that the Department refused to give a single one of fourteen grants to Trinity Lutheran—the fifth most deserving applicant by the Department's own calculation—is because Trinity Lutheran is a church. *See Trinity Lutheran*, 788 F.3d at 782 (Department letter stating that "constitutional limitations" in the Missouri Constitution prevented it from awarding a grant to Trinity Lutheran).

Because the Department's actions accord differential treatment on the basis of religion, the Department must satisfy strict scrutiny. That standard requires the Department to prove that its actions further a compelling state interest and are "narrowly tailored" to further that interest. *Adarand*, 515 U.S. at 227. The Department cannot come close to satisfying either requirement.

A. No Compelling Interest Justifies the Department's Exclusion of Religious Entities from the Scrap Tire Program

The only compelling interest that the Department puts forward is an interest in complying with the state

constitution's Establishment Clause. *See Trinity Lutheran*, 788 F.3d at 782. That interest cannot justify targeting religion in a way that violates the federal Constitution. *Reynolds v. Sims*, 377 U.S. 533, 584 (1964) ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls.").

In *Widmar v. Vincent*, 454 U.S. 263, 275-76 (1981), this Court invalidated a state university's policy of opening its facilities to student activities except for groups engaged in religious activities. In attempting to justify its open exclusion of religious organizations, the University pointed to the same provision relied upon by the Department in this case: Article I, section 7, of the Missouri Constitution. *Compare id.* at 277, *with Trinity Lutheran*, 788 F.3d at 782. The Court rejected the University's argument, noting that any interest in "achieving greater separation of church and State" as embodied in the state constitution "is limited by the Free Exercise Clause and . . . the Free Speech Clause" of the federal Constitution. *Id.* at 277. The Department's effort to justify its discriminatory treatment of religious entities here is no more than an attempt to re-litigate *Widmar*. In this case, as in *Widmar*, the Court should reject Missouri's efforts to rely upon state constitutional interests when doing so would shatter federal constitutional guarantees.

B. The Department's Decision to Exclude Religious Entities from the Scrap Tire Program Is Not Narrowly Tailored

Even if the Department's interest in overriding federal constitutional provisions with state constitutional justifications were somehow compelling, the Department's actions were not narrowly tailored to

further that interest. Narrow tailoring requires "serious, good faith consideration of workable . . . alternatives" that do not mechanically exclude disfavored groups. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

The Department could have conformed to the State's constitution by examining the connection between the fund and the practice of religion itself. Even a cursory glance at the Scrap Tire Program would have revealed that funding safer playgrounds—unlike using public funds to train clergymen, *cf. Locke v. Davey*, 540 U.S. 712, 722-23 (2004)—does nothing to promote religion at the expense of secular activities.

A government program *might* satisfy the narrow tailoring requirement if the exclusion were limited to activities that explicitly promote religious interests—*e.g.*, federal funds for "sectarian instruction or religious worship." 20 U.S.C. § 1062(c). Yet the government cannot satisfy narrow tailoring when it gratuitously excludes religious organizations from an otherwise secular program.

Missouri hardly implicates its Establishment Clause when it provides "police and fire" services to churches or when it gives welfare checks to the religious poor, who may use that money for religious purposes (tithing) or non-religious ones (buying milk). *Widmar*, 454 U.S. at 274. Just as with fire services and welfare checks, grants under the Scrap Tire Program, which are used to fund safer playgrounds, do not threaten secularism at all.

Here, the Department explicitly passed over a better qualified applicant that was religious for less qualified applicants that were secular. That action is

no more permissible than a fire truck that speeds past burning churches or a welfare program that disregards applications from the religious poor in favor of those from less-deserving atheists.

All this explains why the Department has strained to convince the Court that the proper standard in this case is mere rational basis review. After all, the only world in which the Department's open hostility toward religion can conceivably pass constitutional muster is a world that requires judges to "cup [their] hands over [their] eyes." *Arceneaux v. Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring). But the government cannot evade strict scrutiny under the Equal Protection Clause simply by relying upon *other* constitutional provisions, whether found in the federal or state constitution. Instead, if the Department wants to deny churches the same funds it distributes to other, less-qualified entities, it must demonstrate that its decision is narrowly tailored to further a compelling interest. The Department's failure to do so dooms its efforts to reconcile its exclusion of churches from the Scrap Tire Program with the Equal Protection Clause's prohibition on discriminatory treatment.

CONCLUSION

The decision below should be reversed.

DATED: April, 2016.

Respectfully submitted,

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In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,

Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RELIGIOUS AND CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

Amici are religious and civil-liberties organizations that share a commitment to religious freedom and the separation of church and state. *Amici* believe that public funding causes religious groups to become dependent on governmental largesse and triggers governmental oversight that infringes on religious groups' internal affairs, ultimately corroding and corrupting religion and houses of worship. *Amici* therefore oppose petitioner's effort to force states to fund religious institutions in violation of state constitutional provisions designed to protect religious groups' independence.[1]

The *amici* are:

- Americans United for Separation of Church and State;
- The Anti-Defamation League;
- Central Conference of American Rabbis;
- Hadassah, the Women's Zionist Foundation of America;
- Interfaith Alliance Foundation;
- Jewish Social Policy Action Network;
- Union for Reform Judaism; and
- Women of Reform Judaism.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

Each *amicus*'s individual statement of interest is set forth in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long recognized a "play in the joints" between the Establishment and Free Exercise Clauses that permits government to choose not to fund religious institutions even when that funding might otherwise be constitutionally permissible. *Locke* v. *Davey*, 540 U.S. 712, 719-720 (2004). Petitioner asks the Court to all but eliminate that sphere of governmental discretion by limiting *Locke*—and the precedents on which it rests—to decisions whether to provide public funding for the training of ministers.

But the fundamental antiestablishment interests recognized in *Locke* are not so limited. The framers of the First Amendment and of the early state constitutions sought broadly to protect religion against the corrupting influences that could result from public funding—such as inciting unsavory competition for ever larger slices of governmental largesse, encouraging distortions of religious doctrine as churches try to make themselves more attractive to political decisionmakers, and engendering political divisiveness and strife along religious lines. Just as importantly, the framers sought to protect citizens against what they identified as the particular tyranny of being taxed to support houses of worship and religious denominations whose beliefs one does not share.

Missouri chose to avoid those political and social ills, and the injuries to freedom of conscience that ac-

company them, by including the following protections in its Constitution:

- "no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion" (Mo. Const. Art. I, § 6);
- "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; * * * that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship" (*id.* § 7); and
- no state entity "shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or * * * help to support or sustain any private or public school * * * or other institution of learning controlled by any religious creed, church or sectarian denomination whatever" (*id.*, Art. IX, § 8).

The decision of the people of Missouri to leave the support of churches to church members is a valid and important means of protecting the religious freedom of all individuals and all religious denominations. The Court should resist petitioner's invitation to strip Missouri of the ability to vindicate fundamental antiestablishment principles.

ARGUMENT

Missouri's Decision To Provide Discretionary Grants Solely To Nonreligious Organizations Does Not Violate The Federal Constitution.

A. The Free Exercise Clause Does Not Require Missouri To Include Churches In Its Program For Granting Public Funds.

Petitioner contends that every distinction between churches and other entities is constitutionally suspect and must be subjected to strict scrutiny. But that argument is sharply inconsistent with settled principles. If adopted, it would upend firmly established precedent that protects religious belief and religious institutions against the heavy hand of government. And it would require the Court to repudiate the rationale of *Locke* v. *Davey*.

1. The law has long singled out churches for different treatment. The "play in the joints" between the Free Exercise and Establishment Clauses not only gives governmental bodies authority to prohibit funding of religious institutions that may be allowed by the Establishment Clause, but also provides leeway for government to protect religious exercise to a greater extent than the Free Exercise Clause requires. For example, churches are not subject to:

- Legal requirements governing retirement plans under ERISA (29 U.S.C. § 1003(b)(2)).
- Registration requirements under the Lobbying Disclosure Act (2 U.S.C. § 602(8)(B)(xviii)).
- The obligations of nonprofit organizations to register with the Internal Revenue Ser-

vice and submit annual informational tax filings (26 U.S.C. §§ 501(c)(1)(A), 6033(a)(3)(A)(i) & (iii)).

- Title VII's prohibition against religious discrimination in hiring (42 U.S.C. § 2000e-1(a)).

Underlying these instances of distinct treatment are not only interests in protecting religious exercise but also what this Court has recognized to be valid and important "antiestablishment interests" (*Locke*, 540 U.S. at 722) in preventing state involvement in the governance, operation, doctrine, and funding of churches.

Hence, although the Court has in some circumstances upheld against Establishment Clause challenge decisions by States to *include* religious institutions in discretionary grant programs, it has never held, or even hinted, that those decisions were compelled by the Free Exercise Clause. Each of the precedents regarding governmental support on which petitioner relies is grounded in the Free Speech Clause, not the Free Exercise Clause, and concerns access to government-established forums for speech.[2]

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[2] See *Bd. of Educ.* v. *Mergens*, 496 U.S. 226 (1990) (striking down on free-speech grounds a high school's denial of a student religious group's request to meet on school premises during non-instructional time); *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (striking down on free-speech grounds a high school's prohibition of a religious group's use of public-school facilities to show a film after school hours); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (striking down on free-speech grounds a public university's denial of a payment to outside contractors to print a student group's publications); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001) (striking down a high school's refusal

Petitioner's approach would radically reshape this Court's First Amendment jurisprudence—so that any public funding not *barred* by the Establishment Clause would be *required* by the Free Exercise Clause—and would thereby effectively eliminate any "play in the joints" between the Establishment and Free Exercise Clauses, notwithstanding the Court's repeated reliance on that principle. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 714 (2005); *Locke*, 540 U.S. at 718-719; *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970). Government would, under that view, be prohibited from treating churches differently in spending programs—an approach that, among other things, would invalidate provisions in thirty-nine state constitutions. See Appendix to Brief of Baptist Joint Committee, *et al.*, as *Amici Curiae* in Support of Respondent.

The impact of petitioner's new "mandatory equal treatment" principle would also extend well beyond grant programs. All other differential treatment of churches—including the examples listed above—would likewise become subject to strict-scrutiny review and therefore would be invalid unless required

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to allow religious groups to use school facilities for meetings outside school hours); *Widmar* v. *Vincent*, 454 U.S. 263 (1981) (holding that a public university could not exclude a student religious group from meeting in university facilities for the purposes of religious worship or instruction).

Petitioner does not actually contend that Missouri violated the Free Speech Clause. Any free-speech argument has therefore been waived. In any event, any such argument is foreclosed by *Locke*'s holding that the Free Speech Clause did not apply because "the Promise Scholarship Program is not a forum for speech." 540 U.S. at 720 n.3. The claim here—concerning state funding relating to safety of playground facilities—is even more removed from any conceivable speech-related interest.

by either the Establishment or Free Exercise Clauses. That, of course, is the very approach that this Court previously rejected. See, *e.g.*, *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 334, 335 (1987) ("[t]here is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference'"; and "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions").

Nothing in this Court's decisions supports the dramatic expansion of the Free Exercise Clause and dramatic reduction in governmental discretion that petitioner seeks. On the contrary, Missouri's decision not to extend its grants of public funds directly to churches is plainly permissible under the Court's settled precedents.

2. This Court in *Locke* v. *Davey* applied the principles just described to reject a free-exercise claim virtually identical to petitioner's argument here. Although *Locke* involved a scholarship for training as a minister while this case involves funds for maintenance of church property, *Locke*'s rationale precludes petitioner's claim.

The *Locke* Court stated that "the subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment." 540 U.S. at 721. And it proceeded to detail the history of these important state "antiestablishment interests," observing that "[s]ince the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was

one of the hallmarks of an 'established' religion." *Id.* at 722.

As *Locke* recognized, the founding generation believed that governmental support harms religion, both because it may produce resentment and religious strife, and because coerced religious activity hinders individual freedom of conscience by substituting compulsion for voluntary adoption of religious beliefs.

These principles found early expression in the theology of Roger Williams, the founder of Rhode Island. Williams explained that for religious belief to be genuine, people must come to it of their own free will. Roger Williams, *The Bloudy Tenent, of Persecution for Cause of Conscience* 28 (1848) ("the church of Christ doth not use the arm of secular power to compel men to the faith or profession the of truth, for this is to be done by spiritual weapons"), reprinted in 3 Complete Writings of Roger Williams (Samuel Caldwell ed., 1963). When government involves itself in matters of religion, Williams warned, the coercive authority of the state impedes this exercise of free will, while also causing bloody civil strife. Thus, Williams taught, keeping church and state separate is crucial both to protect individual religious dissenters against persecution and to safeguard religion and the church against impurity and dilution. See *ibid.*; Edwin Gaustad, *Roger Williams* 13, 59, 70 (2005); Richard McBrien, *Caesar's Coin: Religion and Politics in America* 248 n.37 (1987).

That same view was prevalent at the time of the Nation's founding. For example, Benjamin Franklin explained:

> When a religion is good, I conceive it will support itself; and when it does not support itself, and God does not care to support it, so that its professors are obliged to call for the help of the civil power, 'tis a sign, I apprehend, of its being a bad one.

Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), quoted in The American Enlightenment: The Shaping of the American Experiment in a Free Society 93 (Adrienne Koch ed. 1965).

James Madison put it more succinctly: "[R]eligion & Govt. will both exist in greater purity, the less they are mixed together." Letter from James Madison to Edward Livingston (July 10, 1822), in James Madison, *Writings*, 786, 789 (Library of Am. 1999). See generally Noah Feldman, *Intellectual Origins of the Establishment Clause*, 77 N.Y.U.L. Rev. 346, 356-61 (2002).

These deeply held views are the reason why "[m]ost States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry." *Locke*, 540 U.S. at 723.

The *Locke* Court relied on this history to uphold a state scholarship program's statutory exclusion for theology students—an exclusion based on a provision of the Washington Constitution. The Court held that neither the statute nor the constitutional provision was motivated by "animus toward religion"; they instead reflected the "historic and substantial state interest" in ensuring that religious ministries are supported by private money instead of tax dollars. *Id.* at 721–23, 725. Because the burden on religion was

"minor" while the State's antiestablishment interests were "substantial," the law was constitutional. *Id.* at 725.

Petitioner attempts to distinguish *Locke* on the ground that the state antiestablishment interest on which the Court relied is limited to avoiding public funding for the training of ministers. That view is based on a misreading both of *Locke* and of the history on which *Locke* rests.

The state constitutional prohibitions embodying the important antiestablishment interest recognized in *Locke*—and those provisions' underlying history—encompass the use of public funds for the construction or maintenance of church property or for the support of religious instruction. Thus, the Court has explained that "[t]he imposition of taxes to pay ministers' salaries ***and to build and maintain churches and church property*** aroused [the Framers'] indignation. It was these feelings which found expressions in the First Amendment." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 11 (1947) (emphasis added).

Indeed, "the most famous example of public backlash" against governmental support for religion (*Locke*, 540 U.S. at 722 n.6) was the rejection in Virginia of a bill to assess a tax to support the teaching of religion by clergy, and the enactment instead of Jefferson's "Virginia Bill for Religious Liberty." That bill "guaranteed 'that no man shall be compelled to frequent or support any ***religious worship***, ***place***, or ministry ***whatsoever***'" (*ibid.* (emphasis added))—and therefore precluded government from supporting church property or religious instruction.

In keeping with this history, the state constitutional provisions that the *Locke* Court cited as exemplifying antiestablishment interests were not limited to prohibiting the use of tax funds to support clerical training. Instead, they extended to "erect[ing] or support[ing] any place of worship." Pa. Const., Art. II (1776), reprinted in 5 Federal and State Constitutions, Colonial Charters and Other Organic Laws 3082 (F. Thorpe ed. 1901) (reprinted 1993); see also Ga. Const. of 1798, Art. IV § 10 (1789) ("No person within this State shall ever be obligated to pay tith[e]s, taxes, or any other rate, ***for the building or repairing any place of worship, or for the maintenance of any minister or ministry***") (emphasis added); Ky. Const. of 1792, Art. XIII, § 3 (1792) ("[N]o man can of right be compelled to ***support any place of worship*** [and] no preference shall ever be given by law to any religious societies or modes of worship") (emphasis added); S.C. Const., Art. XXXVII (1778) (forbidding "***any tax for the support of churches***") (emphasis added).

The grant sought by Trinity Lutheran implicates the core historical concerns that tax funds not be used to support churches, church property, or religious instruction:

- The grant would be used to improve the physical facilities of a church.
- It would aid a program that involves religious instruction: Petitioner's complaint candidly admits that the grant would aid a preschool that "is a ministry of the Church," "incorporates daily religion * * * into a school and optional day-care program," "teaches a Christian world view to children," and provides "an educa-

tional program structured to allow a child to grow spiritually." Compl. ¶¶ 14-16 (App. 101a). The complaint adds that "[t]he Church use[s] [the preschool] to teach the Gospel to children of its members, as well [as] to bring the Gospel message to non-members." *Id.* ¶ 17 (App. 101a). And the Church expressly refused to sign a required certification on its grant application that the grant "will be used for secular rather than for sectarian purposes." Compl. Ex. B (App. 128a).

- By freeing up church funds to be used for purposes other than the preschool grounds, the grant would aid the Church as a whole.

The *Locke* Court's ruling is thus fully applicable here: "That early state constitutions saw no problem in excluding only the ministry from receiving state dollars reinforces" the conclusion that use of tax funds to maintain church property that supports religious instruction "is of a different ilk." 540 U.S. at 723 (emphasis omitted). "Given the historic and substantial state interest at issue," the denial of funds in these circumstances—like the restrictions on scholarships in *Locke*—is not "inherently constitutionally suspect." *Id.* at 725.[3]

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[3] *Locke*'s conclusion is consistent with this Court' s recognition that a state is not "constitutionally obligated to provide even 'neutral' services to sectarian schools," because the "value of free religious exercise in our constitutional scheme leaves room for 'play in the joints' to the extent of cautiously delineated secular governmental assistance to religious schools." *Norwood* v. *Harrison*, 413 U.S. 455, 469 (1973). See also *Luetkemeyer* v.

2. Petitioner's other attempts to distinguish *Locke* are similarly unavailing.

As in *Locke*, the denial of funding for purchasing recycled tires "imposes neither criminal nor civil sanctions on any type of religious service or rite"; and it "does not deny to ministers the right to participate in the political affairs of the community." 540 U.S. at 720-721.

Neither does Missouri require private individuals to "choose between their religious beliefs and receiving a government benefit." 540 U.S. at 720. To begin with, there is no claim here that Missouri's decision not to grant funds somehow burdens any individual's religious choice. And the Missouri program does not distinguish among religions or condition the availability of public funds on particular religious beliefs. Excluding all churches from eligibility for direct grants of public funds simply does not implicate this concern.

Petitioner also contends (Br. 11-34) that this case differs from *Locke* because it allegedly involves "religious status discrimination"—relying on *Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520 (1993). But that is the precise claim that the Court considered and rebuffed in *Locke*, "reject[ing

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Kaufmann, 419 U.S. 888 (1974), aff'g mem., 364 F. Supp. 376 (W.D. Mo. 1973) (three-judge court) (rejecting a free-exercise and equal-protection attack on a Missouri statute that authorized free bus transportation for public-school pupils but not for pupils enrolled in church-related schools); *Brusca* v. *State Bd. of Educ.*, 405 U.S. 1050 (1972), aff'g mem., 332 F. Supp. 275 (E.D. Mo. 1971) (three-judge court) (rejecting free-exercise and equal-protection challenge to clauses of Missouri Constitution that prohibited the state from aiding religious but not secular private schools).

the plaintiff's] claim of presumptive unconstitutionality" and refusing to "extend the *Lukumi* line of cases" to the context of governmental grant programs. 540 U.S. at 720. To be sure, this case involves the exclusion of churches from a grant program, and *Locke* did not. But no precedent of this Court requires equal treatment of churches in the distribution of government funds, and many of the Court's decisions make clear that government may treat churches differently from other organizations. There simply is no support for petitioner's claim that differential treatment of churches by itself always triggers strict scrutiny.

What is more, *Lukumi* did not even involve a categorical exclusion of all churches, but rather a claim of *discrimination against a particular religion*: that the plaintiff was singled out for less favorable treatment because of its specific beliefs. 508 U.S. at 534 ("[t]he record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances"). There is no claim of such discrimination here.[4]

Similarly flawed is the assertion that *Locke* is inapplicable because the grant program provides funds to purchase surfacing made from recycled tires and therefore provides only "secular and nonideological services" (Becket Am. Br. 11). The

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[4] Petitioner's *amici* also point to *Locke*'s statement that "[n]othing in our opinion suggests that the State may justify any interest that its 'philosophical preference' [to "protect individual conscience"] commands." 540 U.S. at 722 n.5. But as in *Locke*, the interests here are traditional antiestablishment interests—in not funding church property or supporting religious instruction—not novel preferences that have no grounding in history.

program provides a direct grant of state funds, not services. And those funds would go to improve church property for a program that indoctrinates very young children in "the Gospel." If this argument were correct, a state program providing grants for purchases of excess timber would have to include churches—on the theory that the program involved the provision of "wood"—even if the timber were to be used to build a new sanctuary or repair an existing one.[5]

Petitioner also attempts to distinguish *Locke* on the ground that the program there "includ[ed] religion in its benefits" (540 U.S. at 724). But nothing in *Locke* requires all governmental funding programs to do so. Rather, that scholarships could be used at religious universities for some purposes was merely one fact that the Court considered in concluding that the disallowance of payment for theological study did not "evinc[e] * * * hostility toward religion." *Id.* The Court noted that "Washington has also been solicitous in ensuring that its constitution is not hostile toward religion." *Id.* at 724 n.8.

The same is true of the Missouri Constitution: It guarantees "[t]hat all men and women have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences" (Art. I, § 5); "that no person shall, on account of his or her religious persuasion or belief, be rendered in-

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[5] Petitioner imagines (Br. 39) a law generally excluding buses from highway tolls but imposing the tolls on church-owned buses. That highly unlikely legislation is extraordinarily far away from a direct grant of public funds for maintenance of church property supporting religious instruction, which lies at the center of the state antiestablishment interests identified in *Locke*.

eligible to any public office or trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his or her person or estate" (*id.*); "that nor shall a citizen's right to pray or express his or her religious beliefs be infringed" (*id.*); "that the state shall ensure that any person shall have the right to pray individually or corporately in a private or public setting" (*id.*); "that citizens as well as elected officials and employees of the state of Missouri and its political subdivisions shall have the right to pray on government premises and public property" (*id.*); "that students may express their beliefs about religion in written and oral assignments free from discrimination based on the religious content of their work" (*id.*); "that no student shall be compelled to perform or participate in academic assignments or educational presentations that violate his or her religious beliefs" (*id.*); "that the state shall ensure public school students their right to free exercise of religious expression without interference" (*id.*); "that no * * * discrimination [shall be] made against any church, sect or creed of religion, or any form of religious faith or worship" (*id.* § 7); that tax exemptions may be provided for religious institutions (Art. X, §§ 6, 6(b)); and even that religious groups have a right to conduct raffles and bingo (Art. III, §§ 39(a), (f)).

What is more, Missouri exempts church-owned childcare centers from licensing requirements applicable to nonreligious providers. Mo. Rev. Stat. § 210.211.

In light of the wide benefits that Missouri's constitution and childcare regulatory scheme provide for religious entities and individuals, and the long-standing antiestablishment interests underlying

Missouri's prohibitions against public funding for churches, no one could reasonably view Missouri's denial of the grant to petitioner as evincing hostility toward religion.[6]

* * *

There simply is no valid basis for reaching a result here different from the one in *Locke*. The Court should therefore hold that Missouri's decision not to grant public funds to a church for the purpose of improving church property used in ministering to preschoolers is entirely permissible under *Locke*.

B. The Constitution Permits States To Avoid The Risk Of Impermissible Religious Entanglement By Deciding Not To Include Churches In Grant Programs.

Direct grants of public funds to churches carry unique costs—and risks of constitutional challenges—not associated with grants to other types of entities. For example, the Court has held that grants of public funds to religious institutions must be monitored to ensure that they are used for the intended, permissible secular purpose. In some circumstances, such as where the funds would be granted directly to

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[6] The State *amici*'s reliance (Br. 13) on *Mitchell* v. *Helms*, 530 U.S. 793 (2000), confirms that petitioner and its *amici* seek to eliminate the play in the joints that this Court has repeatedly reaffirmed: These *amici* would take a plurality decision that merely allowed across-the-board provision to private schools of secular supplies that were stringently restricted to secular uses, and transform it into a new, far-reaching rule requiring state funding of religious institutions even when that funding is issued through discretionary decisions and supports church property that can freely be used for religious instruction and proselytization.

a church, there may be no such permissible secular use. And once government embarks on such grant programs, and awards funds to some religious entities but not others, it becomes susceptible to claims of discrimination among denominations based on religious belief.

States that wish to avoid these serious risks, and the often-significant administrative costs that must be incurred to prevent them, may exclude churches from discretionary grant programs without running afoul of the Free Exercise Clause. That is the essential practical corollary of the "play in the joints" that this Court has repeatedly recognized.

First, direct grants of state funds to a church carry a materially greater risk of impermissible entanglement than when the aid is indirect and flows to an individual rather than the religious entity. *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986) (observing that "critical to our decisions" upholding tuition-aid grants to students "was the fact that the aid was indirect"); see also *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 649 (2002) (internal citations omitted) ("our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals"); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) ("By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents.").

The Court has required government to monitor direct grants of public funds to religious institutions to ensure that the money is not used for religious purposes. In *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), the Court rejected a facial challenge to a statutory grant program that included religious institutions among its recipients, but cautioned: "[t]here is no doubt that the monitoring of [the] grants is necessary if the [government] is to ensure that public money is to be spent in a way that comports with the Establishment Clause." *Id.* at 615. See also *Agostini* v. *Felton*, 521 U.S. 203, 234 (1997) (discussing monitoring requirement).

Missouri therefore would at a minimum be required to monitor the proposed and actual use of the government funds awarded to churches. And that monitoring would of necessity extend to a number of factors:

- Whether the church property is imbued with religious meaning—for example a playground design may include religious symbols or figures from Bible stories or other religious teachings.
- Whether the church property is or could be used for religious instruction, either because of its design or because religious classes take place there.
- Whether the church property is or could be used for religious ceremonies.
- Whether the church property is otherwise used for religious indoctrination—for instance, if proselytizing is pervasive in the hosted church programs.

- Whether the public funds are actually used for the intended purposes.

These obligations would add substantial costs and administrative burdens to the Missouri program.

Second, even such monitoring may not be sufficient to eliminate the legal risk associated with grants of public funds directly to a church. That is because there is a significant possibility of an Establishment Clause claim when the institution receiving public funds has no separate secular purpose—which plainly is the case when the recipient is a church. And this Court's jurisprudence provides little clarity about the steps that a State should take to prevent such a claim.

Members of the Court have uniformly recognized "special dangers associated with direct money grants to religious institutions." *Mitchell*, 530 U.S. at 855 (O'Connor, J., joined by Breyer, J., concurring in the judgment); see also *id.* at 818 (plurality opinion of Thomas, J.) (internal citation and emphasis omitted) ("we have seen 'special Establishment Clause dangers' when money is given to religious schools or entities directly"). "[D]irect money grants" are "accord[ed] special treatment" because "this form of aid falls precariously close to the original object of the Establishment Clause's prohibition"—"'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Id.* at 855-56 (O'Connor, J., joined by Breyer, J., concurring in the judgment).

Any governmental entity contemplating such a grant of funds faces a difficult dilemma. Monitor too little, and public funds could be used for impermissible purposes—particularly when the recipient lacks a distinct secular purpose, as is the case when the

funds would be disbursed to a church. Monitor too much, and there is a serious risk of governmental intrusion into and interference with the manner in which the church conducts its internal operations. See *Roemer* v. *Bd. of Pub. Works*, 426 U.S. 736, 765 (1976) (observing that the monitoring necessary for cash aid designed to "subsidize separate secular functions" would have to be so strict that it inevitably would unconstitutionally entangle government with religion).

These concerns are compounded here because the funds would be granted to a church for maintenance of the church's own property—an area in which the Court has recognized the impossibility of distinguishing "secular" facilities from "religious" ones. *Comm. for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 774 (1973) (holding unconstitutional grants of funds for maintenance and repair of "nonpublic schools, virtually all of which are Roman Catholic schools," because "[n]o attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, ***nor do we think it possible, within the context of these religion-oriented institutions, to impose such restrictions***") (emphasis added).

Thus, wholly apart from the added costs of monitoring, Missouri could well face litigation challenging any grants to churches on Establishment Clause grounds, either because the State's monitoring was ineffective or because it was too intrusive. The Constitution should permit a State to avoid these risks and costs by exercising discretion to exclude churches from its grant program.

Third, government may not discriminate among religious groups. *Church of the Lukumi Babalu Aye*,

supra; *Larson* v. *Valente*, 456 U.S. 228 (1982). Including churches within the grant program would carry the significant risk that Missouri would be subjected to claims of discrimination among churches.

Employing ostensibly secular criteria—such as the number of students served or size of the playground—likely would end up favoring religious groups with larger congregations or greater resources, creating the appearance of favoritism for majority denominations. The problems could be compounded if religious groups that receive grants subsequently claim an entitlement to additional grants for repairs as the playgrounds deteriorate. And even if the State established a random procedure for providing grants, some religious groups would inevitably receive the grants while others would be denied, again favoring some religions over others.

Whatever criteria were adopted, the choice of some churches over others could produce claims of discrimination—particularly if the criteria resulted in the selection of churches belonging to "mainstream denominations" rather than smaller congregations and minority or disfavored faiths.

States should be permitted to avoid the appearance of disparate treatment, inevitable when all applicants are not guaranteed funding, and the accompanying serious risk of constitutional litigation. Missouri's exclusion of churches saves the State from the unsavory—and potentially liability-creating—task of picking and choosing which religious groups get funding and which do not.

For these reasons, as well as those set forth in *Locke*, Missouri's decision to exclude churches from

its grant program is not "inherently suspect" and does not violate the Free Exercise Clause.

C. Petitioner's Erroneous Claims Regarding the Alleged Anti-Catholic Roots of Missouri's Constitutional Provision Provide No Basis For Invalidating The State's Choice.

Petitioner and its *amici* argue that one of the provisions of the Missouri Constitution barring grants of public funds to churches (Art. I, § 7) was motivated by anti-Catholic animus tied to the "Blaine Amendment" and therefore cannot be invoked by the State to exclude churches from the grant program. That contention should be rejected for three reasons.

First, petitioner did not advance this argument before the court of appeals or develop any factual support for its assertions. The argument is therefore waived.

Second, petitioner is wrong as a matter of history. The no-funding principle embodied in constitutional provisions such as Missouri's rests on fundamental antiestablishment concerns relating to avoidance of coercion of taxpayers, protection of churches from government, and prevention of competition among faiths—concerns that substantially predated the Blaine Amendment, as this Court explained in *Locke*. Many of these state provisions were thus enacted long before the Blaine Amendment was proposed. See Brief of Legal and Religious Historians as

Amici Curiae in Support of Respondent, Parts II & IV.[7]

That is the case in Missouri. The State's 1820 Constitution included the predecessor of Article I, § 6—which provides that "no man can be compelled to erect, support or attend any place of worship, or to maintain any minister of the gospel or teacher of religion." See Mo. Const. of 1820, Art. XIII, § 4 (1821). That provision independently precludes the grant of state funds at issue here, and even petitioner does not attempt to tie it to anti-Catholic animus.

The constitutional provision that petitioner does discuss, Article I, § 7, was proposed seven months before the Blaine Amendment, and was merely a revision of a similar clause that had been passed five years earlier—and proposed five years before that. See Mo. Const. of 1865, Art. IX, § 10 (1870); Brief of Legal and Religious Historians as *Amici Curiae* in Support of Respondent, Part V. There simply is no credible evidence linking this provision to the Blaine Amendment or anti-Catholicism. *Ibid.*; see *Locke*, 540 U.S. at 723 n.7 (because "[n]either Davey nor *amici* have established a credible connection between the Blaine Amendment and * * * the relevant constitutional provision," "the Blaine Amendment's history is simply not before us" and the question of religious bigotry "is not at issue in this case").

What is more, the Missouri Constitution's no-aid provisions were re-enacted in 1945, and there is no

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[7] The Blaine Amendment itself arose from such motives, and a desire to protect the public-school system, not predominantly from anti-Catholic animus; indeed, the Amendment was supported by some Catholics. See Brief of Legal and Religious Historians as *Amici Curiae* in Support of Respondent, Part III.

allegation of any anti-Catholic animus at that time. See Mo. Const. of 1945 (1945).

Third, even if, contrary to the facts, the Missouri no-aid provisions could somehow be connected to anti-Catholic animus, petitioner's argument would still fail. This Court's precedents do not support striking down a long-standing law based on an improper, more-than-century-old purpose in the absence of *both* unambiguous historical evidence that the improper purpose was the law's predominant one and a present-day impermissible effect.

Thus, the Court in *McGowan v. Maryland*, 366 U.S. 420 (1961), upheld Sunday-closing laws despite their "strongly religious origin" tied to the Christian Sabbath. *Id.* at 433. The Court reasoned that the challenged "statutes' *present* purpose and effect is not to aid religion, but to set aside a day of rest." *Id.* at 449 (emphasis added).

Similarly, Missouri's no-aid provisions today apply—and are applied—equally to all religious groups and do not single out Catholics. See, *e.g.*, *Mallory* v. *Barrera*, 544 S.W.2d 556, 562 (Mo. 1976) (denying aid to religious schools generally); *Harfst* v. *Hoegen*, 163 S.W.2d 609, 614 (Mo. 1941) (holding that a Catholic school could not be part of the publicly funded school system); *St. Louis Christian Home* v. *Mo. Comm'n on Human Rights*, 634 S.W.2d 508, 511 (Mo. Ct. App. 1982) (noting that an institution run by the Disciples of Christ had been properly denied state funding).

Petitioner's *amici* rely on *Hunter* v. *Underwood*, 471 U.S. 222 (1985); *Lukumi*, 508 U.S. 520; and *Romer* v. *Evans*, 517 U.S. 620 (1996). But the discriminatory Jim Crow laws struck down in *Hunter*

had the purpose and effect of discriminating against African-Americans throughout their history—up to the time of this Court's decision. See 471 U.S. at 227, 229, 233. *Lukumi* and *Romer* involved challenges to laws passed to discriminate against a particular minority that were brought shortly after the laws were enacted—and that had the prohibited discriminatory effect. See *Romer*, 517 U.S. at 627-630, 634; *Lukumi*, 508 U.S. at 534-536.

Excavating ambiguous history that is more than a century old to find suspect intent, and on that basis invalidating laws and constitutional provisions now supported by a legitimate interest and applied in a nondiscriminatory fashion, would allow challenges to a variety of long-accepted laws. Any state or locality that mandates closing of businesses on Sundays would be fair game. See *McGowan*, 366 U.S. at 420. As would laws that prohibit counties from selling alcohol. See, *e.g.*, John Frendreis & Raymond Tatalovich, *"A Hundred Miles of Dry": Religion and the Persistence of Prohibition in the U.S. States*, 10.3 State Pol. & Pol'y Q. 302, 304-05, 314 (2010) ("The existence of dry counties today [is] the legacy of the debate over Prohibition," which was itself "foremost a religious movement.").

In addition, some drug laws might be at risk based on the motives for their original enactment. See Eric Blumenson & Eva Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 Va. J. Soc. Pol'y & L. 43, 82 n.36 (2009) (citing studies linking the passage of marijuana laws to racial animus); Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 Va. L. Rev. 971,

1012 (1970) ("[T]he result was the same in each legislature—little if any public attention, no debate, pointed references to the drug's Mexican origins, and sometimes vociferous allusion to the criminal conduct inevitably generated when Mexicans ate 'the killer weed.'").

Allowing such challenges would put courts in the position of poring through incomplete and very old historical records to determine what connection, if any, originally existed between a facially constitutional law and improper animus—even if that animus has long since been superseded by a legitimate purpose.

The Court should reject the invitation to open the door to such legal challenges—particularly in a case in which the argument was not advanced below and the history demonstrates the ***absence*** of impermissible motive.

D. Missouri's Grant Program Satisfies The Rational-Basis Standard That Governs Under The Equal Protection Clause.

The *Locke* Court held that, because the challenged scholarship program did not violate the Free Exercise Clause, "rational-basis scrutiny [applied] to [the student's] equal protection claims." 540 U.S. at 720 n.3; accord *Johnson* v. *Robison*, 415 U.S. 361, 375 n.14 (1974) (when a statute "does not violate [the plaintiff's] right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test").

Because Missouri's Scrap Tire Grant Program is not "inherently suspect" under the Free Exercise Clause, petitioner's equal-protection claim warrants

only rational-basis review. It easily satisfies that standard.

The program's limitation of funding to nonreligious organizations has a rational basis. The State's interests are "substantial" (*Locke*, 540 U.S. at 725)—both because of the "historic and substantial" antiestablishment interest recognized in *Locke* and because of the important interest in avoiding entanglement with religion. And the denial of the grant here is rationally related to those interests.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization based in Washington, DC, that is committed to preserving the constitutional principles of religious freedom and separation of church and state. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in many of the leading church-state cases decided by this Court, the federal Courts of Appeals, and state appellate courts. Americans United represents more than 125,000 members and supporters across the country. Americans United has long opposed the coercive extraction of taxpayer dollars for the support of religious institutions.

The Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United States, with over 330,000 Members, Associates, and supporters nationwide. While traditional-

ly known for its role in developing and supporting health care and other initiatives in Israel, Hadassah is a strong supporter of the free exercise of religion and the strict separation of church and state as critical in preserving the religious liberty of all Americans, and especially of religious minorities.

Interfaith Alliance Foundation is a 501(c)(3) nonprofit organization that celebrates religious freedom by championing individual rights, promoting policies to protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance Foundation's members belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance Foundation has a long history of working to ensure that religious freedom is a means of safeguarding the rights of all Americans and is not misused to favor the rights of some over others.

The **Jewish Social Policy Action Network** is a membership organization of American Jews dedicated to protecting the constitutional liberties and civil rights of Jews, other minorities, and the weak in our society. For most of the last two thousand years, Jews lived in countries in which religion and state were one and in which the resources of the state supported particular organized religious faiths. In Europe, especially, Jews and minority Christian faith communities experienced how the flow of money to religious groups undermined the neutrality of government and exercised subtle but corrupting influence on religious communities. Those who emigrated to America in the nineteenth and twentieth centuries found that America's unique gift to the world was that here one could be both a Jew and an American, a Catholic and an American, even an

atheist and an American. JSPAN believes that the historic balance struck between free exercise and antiestablishment interests is essential to all our fundamental freedoms, and that this Court should not override state restrictions on money being taken from the public treasury to support a church, even if the state law is more restrictive than the Establishment Clause commands.

The **Union for Reform Judaism**, whose 900 congregations across North America include 1.5 million Reform Jews, the **Central Conference of American Rabbis**, whose membership includes more than 2000 Reform rabbis, and the **Women of Reform Judaism**, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue out of our long-standing commitment to the principle of separation of church and state, believing that it is the bulwark of religious freedom and interfaith amity.

RECORD AND BRIEFS

No. 15-577

In The
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,

Petitioner,

v.

SARAH PARKER PAULEY, Director,
Missouri Department of Natural Resources,

Respondent.

On Writ Of Certiorari To The U.S. Court Of Appeals For The Eighth Circuit

BRIEF OF THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish synagogue organization, representing nearly 1000 congregations across the Nation. The Orthodox Union, through its OU Advocacy Center, has participated in many cases before this Court that, like this one, raise issues of importance to the Orthodox Jewish community, including *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Locke v. Davey*, 540 U.S. 712 (2004); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Through *amicus curiae* briefs, the Orthodox Union seeks to inform the Court of the perspective of our community and the impact a ruling will have. The overwhelming majority of the Orthodox Union's constituents, as well as an increasing number of Jewish parents who are not affiliated with the Orthodox Union, choose to send their children to Jewish schools as well as attend prayer services and educational programs at synagogues. The Orthodox Union is concerned that if the decision below is permitted to stand, it would not only perpetuate bigotry against minority religious faiths, but it

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[1] Pursuant to this Court's Sup. Ct. R. 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. The Clerk of this Court has noted on the docket the blanket consent of all Petitioners to the filing of *amicus* briefs. Respondent has provided *amicus* with written consent.

would also expose religious institutions to significant health, safety and security dangers.

The Orthodox Union thus has a strong interest in this Court's reversal of the decision below. In particular, this case affords the Court an opportunity to end the discrimination against religious minorities perpetuated by state Blaine Amendments and hold that states may not discriminate against faith-based institutions in administering neutral and generally available government funding programs. *Amicus* respectfully requests that this Court reverse the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Today, hundreds of Jewish schools educate more than 250,000 students across the nation. Although the first Jewish "day school" in America opened four decades before the American Revolution, a large number of Jewish schools opened in the nineteenth century in response to the same bigotry against minority faiths that spurred many states to adopt Blaine Amendments. Thus, although state Blaine Amendments are typically associated with anti-Catholic bias, history discloses that they more broadly reflect bigotry toward a number of minority faiths – including Judaism.

Accordingly, whether state Blaine Amendments can mandate state funding programs to exclude

religious institutions – such as Jewish schools and synagogues – solely because they are faith-based is therefore an issue of vital concern to Jewish schools, communities as well as parents in Missouri and across the nation. This Court now has the opportunity to remove unconstitutional barriers from programs that protect children and families who attend Jewish and other faith-specific institutions from real health, safety and security risks.

Like many other non-profit institutions, religious schools and houses of worship face a significant – and growing – range of threats in the 21st century. And it is precisely for this reason that governments have responded to these challenges by providing funding to promote the health, safety, security and sustainability of those institutions in need. Indeed, the federal government and some state and local governments have increasingly embraced their responsibility in these areas to provide funding to protect all of its citizens from these growing dangers on the basis of religion-neutral criteria. And yet, Blaine Amendments – with all their discriminatory history and perilous consequences – persist, serving as an unconstitutional obstacle that singles out religious institutions and exposes them to unwarranted hazards. The price of religious membership cannot and should not be exposure to the health, safety and security dangers of the 21st century.

Blaine Amendments serve to discriminate against religious institutions by imposing blanket and unyielding prohibitions against granting them

government aid. The time has come for this Court to declare such laws unconstitutional.

ARGUMENT

I. Blaine Amendments' Blanket Prohibition Against All Government Funding of Religious Institutions Is Not Only Unconstitutional, But Places Religious Citizens at Risk.

Blaine Amendments, which require states to withhold any and all forms of funding from religious institutions, place religious communities in danger by cutting off religious institutions from vital funding for the health, safety and security of their members. This is particularly true of Missouri's Blaine Amendment, which is one of the most restrictive versions of the original Blaine Amendment in the entire United States. *See* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 587 (2003) ("Missouri teams an extensive prohibition on government aid to religious bodies and religious schools with another constitutional provision that mandates that the state educational fund be used only for the establishment and maintenance of 'free public schools.'").

Thus, Missouri's state constitutional provisions categorically discriminate against religious institutions by refusing to grant them any form of government

funding under any and all circumstances regardless of the context or interests at stake. *See* Mo. Const. Art. I § 7 ("That no money *shall ever be taken* from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect, or creed of religion, or any form of religious faith or worship.") (emphasis added); Mo. Const. Art. IX § 8 ("Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, *shall ever make* an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.") (emphasis added).

A blanket and unyielding refusal to provide direct or indirect state funding to religious institutions – funding made available to all other institutions – exposes religious institutions to significant dangers. Indeed, the inequities – and frankly, the dangers – of Blaine Amendments come into full focus when considering the growth of key government

funding initiatives aimed at protecting and sustaining other vulnerable institutions. There are several important Federal security and safety programs awarded on the basis of religion neutral criteria that are available to religious institutions. *See, e.g.*, Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5206 (1988) (providing federal disaster funds directly to entities which deliver "critical services" including "education");[2] Nonprofit Security Grant Program (NSGP) (providing grants through the U.S. Dept. of Homeland Security "for target hardening and other physical security enhancements to nonprofit organizations that are at high risk of terrorist attack[s]" in the 25 largest metropolitan areas across the U.S.; since its inception in 2007, more than $100 million in grants have been awarded to hundreds of nonprofit institutions – including synagogues, mosques and parochial schools);[3]

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[2] In the DHS Appropriations Act of 2007, Pub. L. No. 109-295, 120 Stat. 1355 (Oct. 4, 2006), Congress amended the Stafford Act to include "education" in the list of "critical services" and did not exclude parochial schools from eligibility for federal disaster recovery grants. *Id.* at § 689h. Therefore, pursuant to 42 U.S.C. § 5172(a)(3)(b), aid for "critical services" includes "education," thereby ensuring that all schools, both public and parochial, can receive funding to repair, restore and replace damages facilities. *See also* Alan Cooperman, *Parochial Schools to Get U.S. Funds for Rebuilding*, WASH. POST (Oct. 19, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/10/18/AR2005101801622.html.

[3] *See* FEMA, Fiscal Year 2016 Nonprofit Security Grant Program, https://www.fema.gov/fiscal-year-2016-nonprofit-security-grant-program. Under the NSGP, funds have been provided to

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Emergency Supplemental Appropriations for Additional Disaster Assistance, For Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104-19, 109 Stat. 194, 253-254 (1995) (authorizing additional amounts for "'Community Development Grants,' as authorized by Title I of the Housing and Community Development Act of 1974" and providing "[t]hat notwithstanding any other provision of law, such funds may be used for the repair and reconstruction of religious institution facilities damaged by the explosion in the same manner as private nonprofit facilities providing public services"); Save America's Treasures Grants, Nat'l Park Serv. (program administered by the National Parks Services in partnership with the National Endowment for the Arts, the National Endowment for the Humanities, the Institute of Museum and Library Services, and the President's Committee on the Arts and the Humanities);[4] Asbestos

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religious schools and congregations. In 2014 alone, 30 New York Jewish organizations received funding pursuant to these programs. Office of U.S. Senator Kirsten Gillibrand: Schumer, Gillibrand Secure Over $2.1 Million To Improve Emergency Preparedness For Religious Institutions & Organizations In-And-Around NYC; Grants Awarded To 30 At-Risk Jewish Schools & Congregations (July 28, 2014), at http://www.gillibrand.senate.gov/newsroom/press/release/schumer-gillibrand-secure-over-21-million-to-improve-emergency-preparedness-for-religious-institutions-and-organizations-in-and-around-nyc-grants-awarded-to-30-at-risk-jewish-schools_congregations.

[4] *See* Save America's Treasures Grants, http://www.nps.gov/preservation-grants/sat/. Save America's Treasures grants have

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School Hazard Abatement Act, 20 U.S.C. §§ 4011-4022 (1988) (providing financial assistance for the abatement of asbestos threats to the health and safety of school children and employees, with grants made to parochial schools).

In recent years, some states and localities have undertaken similar initiatives. *See, e.g.*, New York Secure Ammunition and Firearms (SAFE) Act of 2013, 2013 Sess. Law News of N.Y. Ch. 1 (S. 2230) (McKinney's) (providing for, among other things, the establishment of "New York state school safety improvement teams" and funding to schools for safety equipment);[5] Pennsylvania Safe Schools Act of 2013,

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been awarded for the preservation of the Old North Church in Boston, the Touro Synagogue in Rhode Island, the Eldridge Street Synagogue in New York City, and the Mission Conception in San Antonio. *See* Dep't of the Interior, Office of the Secretary, Old North Foundation Awarded $317,000 Grant Under Save America's Treasures Program (May 27, 2003), http://home.nps.gov/applications/release/Detail.cfm?ID=395, and Dep't of the Interior, Office of the Secretary, Secretary Norton Announces Grants to Rhode Island's Touro Foundation, N.Y. Eldridge Street Project and Texas's Mission Concepcion (Nov. 13, 2013), https://www.doi.gov/sites/doi.gov/files/archive/news/archive/03_News_Releases/031113c.htm.

[5] Funding under the SAFE Act was extended to parochial schools in a budget bill passed a few months after the Act. Aid to Localities Budget, 2013 New York Senate Bill No. 2603, New York Two Hundred Thirty-Sixth Legislative Session, lines 195:38-39 (allocating $4.5 million "[f]or services and expenses of Safety Equipment for Nonpublic Schools."); *see also* Jim Cultrara, *Lawmakers Correct Disparity in School Safety Funding for Catholic Schools*, NEW YORK STATE CATHOLIC CONFERENCE (March 26, 2013), http://www.nyscatholic.org/2013/03/lawmakers-

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24 Pa. Stat. and Cons. Stat. Ann. § 13-1302-A (West) (providing, among other provisions, targeted grants to schools to fund programs which address school violence by establishing or enhancing school security);[6] Local Law to Amend the Administrative Code of the City of New York, in Relation to a Program to Reimburse Nonpublic Schools for the Cost of Security Guard Services, New York City Council, Law No. 2016/002 (2016) (providing funds to nonpublic – including parochial – schools for the costs of security guards).[7]

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correct-disparity-in-school-safety-funding/ (reporting that a group of New York legislators successfully "led the fight to ensure that [SAFE Act] funding for safety and security would be provided to all schools" including parochial schools.); Announcement of SAFE Act Funds Application, Christina Coughlin, Coordinator, Educational Management Services to Nonpublic School Administrators (June, 2015), http://www.p12.nysed.gov/nonpub/schoolsafety/documents/SAFE_Act_Funds_Application_Guidance-2014-2015_and_2015-2016%20-%20Revised.pdf (advising that "[t]he 2014-15 Enacted State Budget provided $4.5 million appropriate for safety equipment for nonpublic schools under the SAFE Act (Year 2). The 2015-16 Enacted State Budget provided an appropriation of the same size (Year 3).")

[6] The Pennsylvania Safe Schools Act was amended by 2013 Pa. Legis. Serv. Act 2013-70 (S.B. 10) (West), to authorize the Office for Safe Schools "to . . . assign school resource officers to carry out their official duties on the premises of the school entity or *nonpublic school*." (emphasis added).

[7] http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1672726&GUID=04BB4A3A-3782-49F9-84E9-9B88AED78713. *See also* Eliza Shapiro & Gloria Pazmino, *Council, de Blasio Reach Deal to Hire Security Guards for Non-Public Schools*, POLITICONewYork (Nov. 25, 2015, 4:13 PM), http://www.capitalnewyork.com/article/city-hall/2015/11/8584137/council-de-blasio-reach-deal-hire-security-guards-non-public-schoo (stating that

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When it comes to health, safety, security and sustainability, religious institutions deserve the same legislative protections afforded all other institutions. This is precisely the principle set forth by this Court nearly six decades ago in *Everson v. Board of Education*, 330 U.S. 1, 17-18 (1947). "Of course, cutting off church schools from . . . services [such as police and fire protection, connections for sewage disposal, public highways and sidewalks] . . . is obviously not the purpose of the First Amendment . . . State power is no more to be used so as to handicap religions than it is to favor them." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947)

Moreover, it is precisely this emphasis on neutrality that this Court has embraced in its more recent Establishment Clause decisions. *See, e.g., Agostini v. Felton*, 521 U.S. 203, 234-35 (1997) ("We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here."); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("[W]e have consistently held that government programs that neutrally provide benefits

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the law "would provide at least one private security guard in non-public schools, including yeshivas and other religious schools with 300 or more students.")

to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."); *Mueller v. Allen*, 463 U.S. 388, 398-99 (1983) ("As *Widmar* [*v. Vincent*, 454 U.S. 263 (1981)] and our other decisions indicate, a program, like § 290.09(22), that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause."); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 488-89 (1986) ("Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion."). Indeed, the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

But Blaine Amendments ignore these core First Amendment principles of neutrality. They perniciously single out religious institutions by denying them access to any and all forms of state government funding – even those necessary to protect schoolchildren and worshipers from danger and violence. In this way, Blaine Amendments pervert non-establishment principles and violate the most central constitutional protections afforded by the First Amendment; they discriminate against religion and

thereby expose religion to harms deemed unacceptable for all other similarly situated institutions.

Missouri's Playground Scrap Tire Surface Material Grants would enable Trinity Lutheran Church to provide a safer playground environment for its students. But Trinity Lutheran Church was denied this funding solely because it is a religious institution. *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 782 (8th Cir. 2015). That denial exposes children, because they attend a religious institution, to unnecessary danger. There is a reason the Establishment Clause does not prohibit such funding. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("[I]f the Establishment Clause did bar religious groups from receiving general government benefits, then a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.") (internal quotation marks and citation omitted). Government has an obligation to protect religious citizens from danger and harm just as it does any other citizen. To allow states to leverage Blaine Amendments – laws motivated by base discrimination – to deny religious institutions neutral and generally available funding for such protections violates the most fundamental of First Amendment principles.

II. State Blaine Amendments Not Only Place Religious Citizens at Risk, But Perpetuate Bigotry Against Minority Faiths, Including Judaism, in Violation of the Free Exercise Clause.

A. The Pernicious Pedigree of Blaine Amendments.

Understanding the history of American Jewish education is helpful in understanding the impact of state Blaine Amendments – and, in turn, understanding that state Blaine Amendments are rooted in bigotry not only against Catholicism specifically (bad as that is), but also against minority faiths generally, including Judaism. This case provides the Court an important opportunity to make clear that nineteenth-century bigotry against minority faiths has no place in twenty-first–century America.

During the early days of our Nation, most Jewish parents educated their children in "common pay (private) schools that assumed the religious identity of their headmaster; or in charity (free) schools supported by religious bodies with financial support from the State." Jonathan D. Sarna, *American Jewish Education in Historical Perspective*, 64 J. OF JEWISH EDU. 8, 10 (1998). Indeed, "[u]ntil the middle of the [n]ineteenth [c]entury, it was not unusual for religious schools to be supported with public funds . . . " Joseph Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 664 (1998); William G. Ross, Pierce *After Seventy-Five Years: Reasons to*

Celebrate, 78 U. DET. MERCY L. REV. 443, 443 (2001) ("[E]ven many of the so-called public schools of the later colonial and early national periods were jointly financed and managed by churches and the state.").

For example, in 1803, New York's only Jewish congregation, Shearith Israel, established a charity school that enjoyed equal footing with Protestant and Catholic schools in the city – and in 1813, sought state funding based on "'the liberal spirit of our constitution.'" JONATHAN D. SARNA, AMERICAN JEWS AND CHURCH-STATE RELATIONS: THE SEARCH FOR "EQUAL FOOTING" 7 n.20 (1997) (quoting Petition (Jan. 10, 1813), reprinted in 27 PUBL'NS AM. JEWISH HIST. SOC'Y 92-95 (1920)); *see also* Sarna, *American Jewish Education*, *supra*, at 10 (citing JONATHAN D. SARNA & DAVID G. DALIN, RELIGION AND STATE IN THE AMERICAN JEWISH EXPERIENCE 85-89 (1997)). More broadly, "[i]n early America . . . Jews readily supported state aid to parochial schools, and at least in New York City received funds on the same basis as Protestant[s] and Catholics." SARNA, AMERICAN JEWS AND CHURCH-STATE RELATIONS, *supra*, at 27. In the early 19th century, however, the creation of "state-supported nondenominational public school spawned a revolution in American education, and affected American Jewish education profoundly." Sarna, *American Jewish Education*, *supra*, at 11. In the eyes of many, these public schools "were imbued with Protestant (and not infrequently anti-Catholic and anti-Jewish) religious and moral teaching." Michael W. McConnell,

Religious Freedom at a Crossroads, 59 U. CHI. L. REV. 115, 121 (1992).

Faced with public schools that were "culturally Protestant" and with "[c]urriculum and textbooks [that] were, consequently, rife with material that Catholics and Jews found offensive," SARNA, AMERICAN JEWS AND CHURCH-STATE RELATIONS, *supra*, at 19, many "Catholics and Orthodox Jews created separate schools." McConnell, *Religious Freedom at a Crossroads*, *supra*, at 121. "As a result, Jews who could afford to do so sent their children to Jewish schools – which flourished not only in New York but in every major city where Jews lived." SARNA, AMERICAN JEWS AND CHURCH-STATE RELATIONS, *supra*, at 19.[8]

The federal Blaine Amendment and its state counterparts sought to stop this flow of funds into minority-faith schools, including Jewish schools. As a periodical published in the years leading up to the Blaine Amendment stated, "[t]he Romanists insist on the appropriation of the public moneys to support the Romish schools in which their religion is taught. . . . To concede this demand, in the present circumstances of the nation, is to break up the whole system of common schools. For if it is allowed to the Romanists,

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[8] For example, Emanuel Nunes Carvalho operated a school in Charleston, South Carolina; Talmud Yelodim did the same in Cincinnati, Ohio; the Washington Hebrew Elementary School operated in Washington, D.C.; and there were many more. *See* Sarna, *American Jewish Education*, *supra*, at 11.

it cannot be withheld . . . from Jews and people of other religious and irreligious persuasions." *Recent Publications on the School Question*, 42 BIBLICAL REPERTORY & PRINCETON R. 315-16 (1870); *see also* Viteritti, *Blaine's Wake*, *supra*, at 666 ("The common-school curriculum promoted a religious orthodoxy of its own that was centered on the teachings of mainstream Protestantism and was intolerant of those who were non-believers.").

While the predominant theory in public schools during the nineteenth century was Horace Mann's Common School model – a supposedly "secular" vision of public education adapted from European versions – his curriculum still relied heavily on Protestant elements as a part of the normal coursework. *See* Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 NOTRE DAME L. REV. 887, 895 (2015) (citing LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925, 69-146 (1987)); TOWARD A USEABLE PAST: LIBERTY UNDER STATE CONSTITUTION 124-25 (Paul Finkelman & Stephen E. Gottleib, eds., 2009) (citing DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954, 20-42 (1987)).

It was "an open secret," then, that in barring aid to sectarian institutions under the Blaine Amendments, "sectarian" was merely a code word for "Catholic." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (opinion of Thomas, J.); Lindsey M. Burke & Jarrett Stepman, *Breaking Down Blaine Amendments' Indefensible Barrier to School Choice*, 8 J. OF SCH. CHOICE:

INT'L RESEARCH & REFORM 637, 638, 646 (2014). In this way, "Horace Mann and his followers used the common schools to impose on Catholic immigrants and other religious minorities the non-sectarian value of the de facto Protestant Establishment." Richard W. Garnett, Brown's *Promise, Blaine's Legacy*, 17 CONST. COMM. 651 (2000) (reviewing JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999)) (internal quotation marks and citations omitted).

Although the Blaine Amendment failed at the federal level, many states, including Missouri, amended their constitutions to adopt the language of the Blaine Amendment nearly verbatim. *See, e.g.*, Mo. Const. Art. I § 7 ("That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect, or creed of religion, or any form of religious faith or worship."). Missouri's Amendments, enacted against the backdrop of the anti-Catholic riots of the 1850's,[9] thereby captured the governing sentiment that no funding could be granted "the Romish

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[9] *See, e.g.*, William Barnaby Faherty, *Nativism and Midwestern Education: The Experience of Saint Louis University, 1832-1856*, 8 HISTORY OF EDUC. QUARTERLY 447, 456 (1968); William Hyde, 4 ENCYCLOPEDIA OF THE HISTORY OF ST. LOUIS, 1917 (1899).

Church," which would never allow "any liberty of thought . . . if it could help it." J. Michael Hoey, *Missouri Education at the Crossroads: The Phelan Miscalculation and the Education Amendment of 1870*, 95 MO. HIST. REV. 372, 389 (2001).

B. Missouri's Blaine Amendment Violates the Free Exercise Clause.

The Supreme Court has been unequivocal in deeming laws that discriminate on the basis of religion as violating the Free Exercise Clause. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court emphasized that "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." 508 U.S. 520, 532 (1993). Indeed, as the Court further underscored, "the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533.

To be sure, in *Locke v. Davey*, the Supreme Court did hold that a state-funded scholarship program could deem students pursuing "degrees in theology" as ineligiole. 540 U.S. 712, 716 (2004). The Court's rationale in justifying this limited exclusion focused on the constitutionality of laws that ensure state funds will not be used to "support the ministry." *Id.* at 723. Thus, the narrow exclusion of scholarship applicants pursuing the ministry through degrees of theology did not "suggest[ ] animus towards religion."

Id. at 725. The Court supported its conclusion by noting the fact "[t]hat early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars." *Id.* at 723 (emphasis in original).

But Blaine Amendments, and in particular Missouri's most-restrictive Blaine adaptation, go far beyond the limited exception granted in *Locke v. Davey*. It is undeniable that two of Missouri's state constitutional provisions categorically discriminate against religious institutions by refusing to grant them any form of government funding under any circumstances. *See* Mo. Const. Art. I § 7 ("That no money *shall ever be taken* from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect, or creed of religion, or any form of religious faith or worship.") (emphasis added); Mo. Const. Art. IX § 8 ("Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, *shall ever make* an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal

property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.") (emphasis added).

Indeed, as noted above, Missouri has implemented one of the most restrictive versions of the original Blaine Amendment in the entire United States. *See* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 587 (2003). Surely, such an unyielding rule finds no support in the religion clauses of the First Amendment.

Courts cannot, of course, uphold legislation specifically passed to disadvantage religious organizations. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible."). As the Court has observed, "[t]he principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions." *Id.* at 523. State Blaine Amendments, though, are among those (thankfully few) violations, and those who passed them "did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom" by discriminating against minority faiths. *Id.* at 524. Accordingly, Blaine Amendments violate core free exercise principles, "exclud[ing] individual Catholics, Lutherans, Mohammedans, Baptists, Jews,

Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (emphasis in original). The Court should, therefore, reverse the decision below and make clear that such discrimination has no place in our increasingly pluralistic society – especially where, as demonstrated next, that discrimination exposes religious communities to the health, safety and security dangers the contested forms of government aid are meant to protect against.

CONCLUSION

For the reasons set forth above, the *amicus* respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Eighth Circuit. Religious discrimination is never justified and it surely cannot be leveraged to establish a blanket and unyielding prohibition against granting religious institutions funding from neutral and generally-available government programs. For Blaine Amendments to persist is not only unconstitutional, but it exposes members of religious institutions

and communities to health, safety and security dangers – the precise dangers such neutral government programs are aimed to avoid.

Respectfully submitted,

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RECORD AND BRIEFS

No. 15-577

IN THE
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR,
MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, MISSOURI CATHOLIC CONFERENCE, NATIONAL CATHOLIC EDUCATIONAL ASSOCIATION, THE SALVATION ARMY NATIONAL CORPORATION, AND GENERAL SYNOD OF THE REFORMED CHURCH IN AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The United States Conference of Catholic Bishops (USCCB) is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. USCCB advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the Conference are the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of this Court's jurisprudence in that regard.

The Church of Jesus Christ of Latter-day Saints is a Christian denomination with 15 million members worldwide. Religious liberty is a fundamental Church doctrine: "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may." Article of Faith 11. And we believe that "governments ... are bound to enact laws for the protection of all citizens in the free exercise of their religious belief." Doctrine and Covenants 134:7. This brief reflects the Church's determination to strengthen religious liberty as a fundamental constitutional right.

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[1] Petitioner has consented to the filing of all *amicus* briefs in a letter on file with the Clerk, and respondent consented to the filing of this brief in correspondence *amici* have filed with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

The Missouri Catholic Conference (MCC) is the public policy agency for the Catholic Church in Missouri, the members of which are the active Catholic Bishops for the four dioceses of the State of Missouri. MCC's purposes include: promoting the material and spiritual well being of all the people of the State of Missouri in the fields of health, education, and social welfare; participating in the democratic process of government, its legislative, executive, and judicial branches; serving as a forum for the dioceses of Missouri in developing positions on statewide and national issues; and providing moral leadership and vision to Catholics and others throughout the State, particularly in the area of public policy. In the area of education specifically, the MCC advocates for access to education for all, and for the rights of Catholic and parochial schools to participate fully in the material and social life of the statewide and local community.

The National Catholic Educational Association (NCEA) is a professional membership organization representing 150,000 Catholic educators serving 2 million students in Catholic elementary and secondary schools. The Association's mission statement and the expectations of its members call NCEA to provide leadership in shaping public policies and political actions that acknowledge and support the important role of Catholic schools in the United States. NCEA supports the rights of all parents to choose Catholic schools for their children and advocates for the equitable participation of Catholic school students in federal and state education programs. Since 1965, students, teachers, and other Catholic school personnel have participated in education programs authorized by the federal government as well as in some state programs. Participation in these programs does not provide direct aid to the schools but only secular,

neutral, and non-ideological benefits to students and their teachers. Religious discrimination that prevents students in faith-based schools from receiving secular benefits and services available to public school students is a violation of their exercise of their First Amendment rights.

The Salvation Army is an international religious and charitable organization with its headquarters in London, England. The Salvation Army is a branch of the universal Christian Church, its own religious denomination. The *amicus* in this action is The Salvation Army National Corporation, a non-profit religious corporation organized under the laws of the State of New Jersey. The Salvation Army National Corporation is the corporate instrumentality of The Salvation Army National Headquarters, which is responsible for coordinating national policies of the four independent Territories of The Salvation Army in the United States. The mission of The Salvation Army is to preach the gospel of Jesus Christ and to meet human needs in His name without discrimination. In furtherance of this mission, The Salvation Army delivers social services to over 25 million persons in the United States annually. The Salvation Army joins this *amicus* brief because of its interest in ensuring that The Salvation Army and other religious organizations will continue to qualify to receive government funding to support the provision of social services.

The General Synod of the Reformed Church in America is the highest assembly and judicatory in the Reformed Church in America. The Reformed Church in America traces its history in North America to 1628, and as a result is the oldest protestant denomination in North America with a continuous history. Today, the Reformed Church in America includes approximately 300,000 people of many cultures across

the North American continent. There are approximately 950 churches in the United States and Canada. These churches are assembled into 44 regional units (each called a classis), and the 44 classes are assembled into 8 regional units (each called a regional synod). Given the varied ministries engaged in by the Reformed Church in America through its local churches, classes, regional synods, institutions, and agencies, the issues addressed in this brief are of great interest and importance to the General Synod.

SUMMARY OF ARGUMENT

The First Amendment's guarantee of the free exercise of religion bars the government from singling out religious persons or groups for disfavored treatment. Yet Missouri has done just that by excluding petitioner Trinity Lutheran from the state's Scrap Tire Program, which subsidizes the replacement of asphalt playgrounds with rubberized material derived from recycled tires. Missouri's only reason for excluding Trinity Lutheran was a state constitutional provision barring public funding for religious organizations; indeed, the state denied Trinity Lutheran's application specifically on the ground that the school is operated by a church. Missouri's overt discrimination against Trinity Lutheran purely because of its religious status is repugnant to the First Amendment.

Like discrimination based on race or national origin, discrimination based on religion is inherently suspect and can be upheld only if necessary to serve a compelling governmental interest. Missouri lacks any legitimate, let alone compelling, interest in excluding Trinity Lutheran from the Scrap Tire Program. Including Trinity Lutheran would not violate the Establishment Clause, or even raise a serious Establishment Clause question. And Missouri cannot justify religious discrimination by pointing to a purported

state interest in maintaining greater church-state separation than the Establishment Clause requires. States have no more discretion to discriminate based on religion in violation of the Free Exercise Clause than to violate any other part of the Bill of Rights.

Nor is Missouri's exclusion of Trinity Lutheran justified by this Court's decision in *Locke* v. *Davey*, 540 U.S. 712 (2004). Neither *Locke*'s holding nor its reasoning "extend[s] to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008) (McConnell, J.). Unlike Missouri's religious discrimination here, the scholarship program in *Locke* did not exclude religious individuals or schools; it did not condition benefits on the surrender of religious rights; and it did not involve a "fungible," religiously neutral benefit like recycled rubber. In addition, Washington constrained the use of scholarship funds solely to further a "historic and substantial" state interest—avoiding taxpayer funding for the religious training of clergy—with no analogue here. No historic or substantial state interest justifies denying public benefits to religious institutions when the benefit is purely secular and cannot be diverted for religious purposes. To the contrary, the Nation has a long and venerable tradition of including religious institutions in neutral public aid programs.

Missouri's religious discrimination not only contravenes the First Amendment, it is profoundly demeaning to people of faith. Official discrimination based on religion is no less invidious or stigmatizing than discrimination based on other protected traits. It sends a message that religious people and their institutions are second-class citizens who deserve special disabilities and are not entitled to participate on equal terms

in government programs. Allowing illusory Establishment Clause concerns to trump the prohibition on religious discrimination would invite state officials to invoke those concerns as a pretext for penalizing religious groups whose beliefs or practices diverge from government-prescribed orthodoxy.

Whatever "play in the joints" exists between the Free Exercise Clause and the Establishment Clause, it does not authorize the blanket exclusion of religious institutions from public benefits programs that provide religiously neutral benefits to a wide range of recipients based on secular criteria and for secular purposes. Otherwise the government could exclude religious institutions from basic public services like police and fire protection. The decision below cannot be reconciled with the Nation's constitutional commitment to religious equality and should be reversed.

ARGUMENT

I. THE CONSTITUTION FORBIDS RELIGIOUS DISCRIMINATION ABSENT THE MOST COMPELLING CIRCUMSTANCES.

This Court's precedents have long recognized that, absent compelling circumstances, the Constitution bars state action that disfavors persons or groups based on their religion. This fundamental principle of religious nondiscrimination is embodied in multiple overlapping provisions of the Constitution, including the Free Exercise Clause, the Establishment Clause, the Equal Protection Clause, and the Free Speech Clause. While each provision serves a distinct purpose, they "all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v.

Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and in judgment).

The Constitution's nearly categorical ban on religious discrimination has many applications. It means that government may not discriminate against particular religious denominations or their adherents. *E.g.*, *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953) (invalidating a municipal ordinance that prohibited Jehovah's Witnesses from preaching in a public park but allowed other religious groups to conduct services there). It means that government may not discriminate against individuals or groups because they are *not* religious. *E.g.*, *Torcaso* v. *Watkins*, 367 U.S. 488 (1961) (invalidating a Maryland constitutional provision requiring individuals to affirm belief in the existence of God as a condition of holding public office). And, conversely, it means that government may not discriminate against individuals or groups because they *are* religious. *E.g.*, *McDaniel* v. *Paty*, 435 U.S. 618 (1978) (invalidating a Tennessee statute barring ministers and priests from serving as delegates to constitutional convention); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951) (invalidating disorderly conduct convictions of Jehovah's Witnesses who gave Bible talks in a park where secular groups had been permitted to hold patriotic celebrations).

Missouri's denial of Trinity Lutheran's application to participate in the Scrap Tire Program violates this bedrock constitutional command of equal treatment. The state admittedly denied Trinity Lutheran's application solely because the school is operated by a church, while granting applications of otherwise similarly situated secular nonprofit organizations. Pet. App. 152a–153a. This overt discrimination against Trinity Lutheran based on its religious status requires Missouri to demonstrate that its exclusion of

religious organizations from the Scrap Tire Program serves a compelling governmental interest that cannot be achieved through nondiscriminatory means.

A. The Free Exercise Clause Prohibits Laws That Target Religion For Special Disadvantages.

1. The Free Exercise Clause prevents government from saddling religious individuals or organizations with disadvantages not borne by others. Indeed, the prohibition against religious discrimination has been "so well understood that few violations are recorded in [this Court's] opinions." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 523 (1993). To ensure that religious discrimination remains rare, this Court has instructed that any law that overtly discriminates against religious individuals or groups, or that otherwise "target[s]" religious adherents for disfavored treatment, *id.* at 533, "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest," *id.* at 531–32. Thus, like distinctions based on race or national origin, distinctions based on religion are inherently suspect. See *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring in judgment) ("The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial.").

Lukumi illustrates how "[t]he Free Exercise Clause protects religious observers against unequal treatment." 508 U.S. at 542 (alteration omitted). There the Court struck down ordinances that "singled out" a religious practice for "discriminatory treatment." *Id.* at 538. The City of Hialeah outlawed the ritual slaughter of animals for sacrificial purposes—a central practice of the Santeria religion—but allowed hunting, fishing, and the slaughter of animals for food. *Id.* at 535–38; see also *id.* at 542 ("the ordinances were ger-

rymandered with care to proscribe religious killings of animals but to exclude almost all secular killings"). This religious gerrymander breached a principle "essential to the protection of the rights guaranteed by the Free Exercise Clause": that government "cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 543. Because the ordinances targeted "religion alone" for special burdens not imposed on similar secular conduct, *id.* at 544, they were required to "undergo the most rigorous of scrutiny," *id.* at 546.

While the ordinances in *Lukumi* targeted a specific religion and a specific religious practice, the Free Exercise Clause's nondiscrimination principle applies equally to laws that impose unique legal disabilities on religious observers without targeting any particular denomination or directly proscribing any religious practice. See *id.* at 532 ("the protections of the Free Exercise Clause pertain if the law at issue discriminates against some *or all* religious beliefs") (emphasis added). In *McDaniel*, for example, the Court invalidated a Tennessee law barring ministers and priests "of any denomination whatever" from serving as delegates to a state constitutional convention. 435 U.S. at 620. A majority of the Justices agreed that the law violated the Free Exercise Clause. *Id.* at 629 (plurality); *id.* at 629–39 (Brennan, J., concurring in judgment). It did not matter that serving as a delegate was not itself an exercise of religion. What mattered was that the state had conditioned "the availability of benefits"—the ability to seek and hold office—on "the surrender" of the right to be a minister, and thus had "effectively penalize[d] the free exercise" of religion. *Id.* at 626 (plurality). This discrimination against McDaniel "because of his *status* as a 'minister,'" the Court held, "encroached upon [his] right to the free

exercise of religion." *Id.* at 626–27; *id.* at 634 (Brennan, J., concurring in judgment).

2. These same principles apply to religious discrimination in public benefit programs. The state may not, for instance, deny unemployment benefits to employees who lose their jobs because they refuse to engage in activity contrary to their religious beliefs. See *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981); *Hobbie* v. *Unemp't Appeals Comm'n*, 480 U.S. 136 (1987); *Frazee* v. *Ill. Dep't of Emp't Sec.*, 489 U.S. 829 (1989). Thus, if the state provides benefits to individuals whose employment is terminated for legitimate nonreligious reasons, "it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Emp't Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 884 (1990); *accord Lukumi*, 508 U.S. at 537; *Hobbie*, 480 U.S. at 148 (Stevens, J., concurring) ("In such an instance, granting unemployment benefits is necessary to protect religious observers against unequal treatment.").

The unemployment benefit cases make clear that the government does not get a free pass under the Free Exercise Clause when spending its own money. See *Sherbert*, 374 U.S. at 404 ("It is too late in the day to doubt that the liberties of religion ... may be infringed by the denial of or placing of conditions upon a benefit or privilege."). Discriminatory denial of government benefits penalizes religious exercise and puts pressure on religious observers to abandon or modify their religious beliefs or practices so they can enjoy the same benefits afforded to others. See *id.* at 405 ("imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights"); *Thomas*, 450 U.S. at 717–18 (denying benefits on account of reli-

gion "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs"). In an era of pervasive government spending, excluding religious individuals and groups from public benefit programs would put a heavy thumb on the scales against religion. See Thomas C. Berg & Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 Tulsa L. Rev. 227, 235 (2004) ("Discriminatory funding is always the worst policy, because it pressures citizens to adapt their own religious choices to the state's favored categories.").

Nor does *Smith* give the government license to exclude religious individuals or groups from public benefit programs. *Smith* held that the Free Exercise Clause does not bar the application of neutral, generally applicable laws to religiously motivated conduct. 494 U.S. at 878–82. But a law that overtly discriminates against religion is neither neutral nor generally applicable. See *Lukumi*, 508 U.S. at 533, 542–43. Far from undermining the principle of religious nondiscrimination, *Smith* reaffirmed that the Free Exercise clause precludes government from "impos[ing] special disabilities on the basis of religious views or religious status." 494 U.S. at 877. And *Smith* expressly confirmed that laws discriminating based on religion are subject to strict scrutiny: "Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion." *Id.* at 886 n.3 (citations omitted).[2]

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[2] Applying *Smith* and *Lukumi*, lower courts have recognized the need for exacting review of laws that discriminate based on religion. See, *e.g.*, *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 364–66 (3d Cir. 1999) (Alito, J.) (heightened scrutiny applies when "religious practice is being

B. Other Constitutional Provisions Likewise Prohibit The Government From Discriminating Against Religious Persons Or Organizations.

The fundamental principle of religious nondiscrimination extends beyond the Free Exercise Clause. It also has animated this Court's decisions under the Establishment Clause, the Free Speech Clause, and the Equal Protection Clause.

1. By prohibiting laws "respecting an establishment of religion," the Establishment Clause restricts governmental actions that discriminate against religion—the government has no more power to establish nonreligion than it has to establish religion. This Court has interpreted the Establishment Clause to ensure that legislation "neither advances *nor inhibits* religion." *Sch. Dist.* v. *Schempp*, 374 U.S. 203, 222 (1963) (emphasis added); *accord Zelman* v. *Simmons-Harris*, 536 U.S. 639, 648–49 (2002); *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring in part and in judgment) (the Establishment Clause "provide[s] no warrant for discriminating *against* religion").

This Court's seminal decision recognizing the incorporation of the Establishment Clause as binding on the states through the Fourteenth Amendment's Due Process Clause underscored that governments may not "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the member of any other faith, because of their faith, or lack of it, from receiv-

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singled out for discriminatory treatment") (emphasis omitted) (quoting *Lukumi*, 508 U.S. at 537–38); *Ward* v. *Polite*, 667 F.3d 727, 740 (6th Cir. 2012) (Sutton, J.) (policies whose exceptions render them neither neutral nor generally applicable "must run the gauntlet of strict scrutiny").

ing the benefits of public welfare legislation." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16 (1947). Cutting off access to government services, the Court held, is not required by the Establishment Clause; neither is it tolerable under the First Amendment for states to "handicap religions" by excluding them. *Id.* at 17–18. Rather, "[t]hat Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers." *Id.* at 18.

Official hostility toward religion is no more permitted under the Establishment Clause than it is under the Free Exercise Clause. See *Lukumi*, 508 U.S. at 532 (the Establishment Clause "forbids an official purpose to disapprove of a particular religion or of religion in general"). Far from justifying exclusion of religious persons or groups, the Establishment Clause requires that government "not be hostile to any religion." *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968); see *Cty. of Allegheny* v. *Am. Civil Liberties Union*, 492 U.S. 573, 657–58 (1989) (Kennedy, J., concurring); *Van Orden* v. *Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in judgment) ("hostility toward religion ... has no place in our Establishment Clause traditions").

2. The Free Speech Clause likewise protects persons from discrimination or exclusion based on their religious views. The government may not discriminate against speech on account of its content or viewpoint without a compelling interest. This prohibition applies equally to religious expression and association. See *Lukumi*, 508 U.S. at 543 (noting "parallels" between the principles of general access required under free speech and free exercise law). Thus, the Court has consistently held that government may not exclude religious speakers from a public forum, and that free speech standards do not change solely be-

cause the state is pursuing greater church-state separation than the Establishment Clause requires. See *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981); see also *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001) (affirming the right of religious groups and speakers to access after-hours facilities on equal footing with secular counterparts).

Even with respect to funding, the Court has "[m]ore than once ... rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger* v. *Rector & Visitors*, 515 U.S. 819, 839 (1995). Rather, the Court "ha[s] held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.*

3. Under the Equal Protection Clause, religious exercise is a "fundamental right." See, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205, 214 (1972). Classification by religion is accordingly an "inherently suspect distinctio[n]," triggering heightened judicial scrutiny. *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (per curiam); *accord, e.g.*, *Burlington N. R.R.* v. *Ford*, 504 U.S. 648, 651 (1992) (heightened scrutiny applies to laws that "classify along suspect lines like race or religion"). Thus, like the Religion Clauses, the Equal Protection Clause forbids religious discrimination unless it is narrowly tailored to serve a compelling governmental interest.

For example, this Court has rejected the use of "unjustifiable standard[s] such as race, religion, or other

arbitrary classification[s]" as factors that may be used in the exercise of prosecutorial discretion. *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962); see *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364–65 (1978) (listing religion as an unjustifiable classification for purposes of plea negotiations); *Wade* v. *United States*, 504 U.S. 181, 186 (1992) (prosecutors may not refuse to file a substantial-assistance motion "because of the defendant's race or religion"). And perhaps the Court's most celebrated equal protection passage—*Carolene Products*' footnote four—explained that the Fourteenth Amendment forbids discrimination on the basis of religion just as it forbids discrimination on the basis of race or national origin. *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

C. *Locke* Does Not Exempt Religious Discrimination From Strict Scrutiny.

In rejecting Trinity Lutheran's claims below, the Eighth Circuit did not cite, let alone distinguish, *any* of this Court's precedents forbidding religious discrimination. Pet. App. 5a–12a. The court relied instead on this Court's decision in *Locke*.[3] Its reliance

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[3] The Eighth Circuit also relied on this Court's summary affirmance in *Luetkemeyer* v. *Kaufmann*, 419 U.S. 888 (1974). But that case is inapposite because the policy at issue there did not classify based on religion—it distinguished between public and private schools, not between religious and nonreligious schools. 364 F. Supp. 376, 387 (W.D. Mo. 1973) ("We find and conclude that the Constitution of the United States does not compel the State of Missouri to provide equal transportation services to private and church-sponsored schools and that it may, as it has, elect to provide such service only for its public schools."). Moreover, any suggestion in the lower court's opinion in *Luetkemeyer* that states are free to exclude religious institutions from public benefit programs when the Establishment Clause permits their inclusion is not binding on this Court, and whatever persuasive force its reasoning once held has been fatally eroded by subse-

on *Locke* was error for two independent reasons. *First*, *Locke* confirmed that a law discriminating based on religion may be upheld only by satisfying strict scrutiny. *Second*, Missouri's asserted interest in not subsidizing the resurfacing of a religious school's playgrounds does not remotely approach the "historic and substantial" state interest at issue in *Locke*. See *infra*, at 23–24. Both aspects of *Locke*—its discussion of the standard for claims of religious discrimination and its discussion of the state interest sufficient to overcome such a claim—merit separate consideration.

Far from altering settled free exercise principles, *Locke* confirmed that religious discrimination triggers strict scrutiny. The Court's opinion expressly reaffirmed precedents like *Lukumi*, *McDaniel*, and *Sherbert*, 540 U.S. at 720–21—all of which applied strict scrutiny to policies that discriminated against religion. Although the Court concluded that Washington's scholarship program did not "disfavor" religion in a way that rendered it "presumptive[ly] unconstitutiona[l]," *id.* at 720, it did not disturb the rule that governmental classifications that disadvantage persons or groups based on their religious status must undergo strict scrutiny. Rather, the Court emphasized three aspects of Washington's scholarship program that made strict scrutiny inappropriate there—and that have no counterpart here.

First, *Locke* distinguished *Sherbert* and its progeny on the ground that Washington's scholarship program "[did] not require students to choose between their religious beliefs and receiving a government benefit." *Id.* at 720–21. That was so because Davey did not have to abandon his pursuit of a theology de-

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quent decisions. See, *e.g.*, *Smith*, 494 U.S. at 877 ("government may not ... impose special disabilities on the basis of religious view or religious status"); *infra*, at 22–23.

gree in order to use his scholarship. *Id.* at 721 n.4. Here, by contrast, that is precisely the choice that Trinity Lutheran faces—it must either abandon its religious character or forgo a government benefit. Missouri cannot put Trinity Lutheran to that forbidden choice. See *Thomas*, 450 U.S. at 716 ("a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program").

Second, *Locke* concluded that Washington's decision to fund training for secular professions did not require it to fund training for religious professions because the two were not "fungible." 540 U.S. at 721. Training for religious professions was qualitatively different from training for other professions because "majoring in devotional theology is akin to a religious calling as well as an academic pursuit." *Id.* Here, by contrast, the benefit is "fungible." There is *no* difference between the benefit denied to Trinity Lutheran—recycled tires to resurface a playground—and the benefit granted to secular schools. Rubber is rubber.

Third, *Locke* emphasized that the scholarship program *accommodated* rather than excluded religious students, religious schools, and even religious instruction: religious students could use the scholarship to attend religious colleges and to pay for religion courses. *Id.* at 724–25. The program did not exclude religious persons or colleges, but only declined to fund a single course of professional study. Here, by contrast, Missouri has categorically excluded religious schools from the Scrap Tire Program, rather than trying to "includ[e] religion in its benefits." *Id.* at 724.

Thus, in stark contrast to *Locke*, Missouri has categorically excluded religious institutions from a public program that provides purely secular benefits, and it has forced Trinity Lutheran to choose between its re-

ligious affiliation and participation in the program. The contrast with *Locke* further confirms that Missouri's exclusion of Trinity Lutheran from the Scrap Tire Program based on its religious status is subject to the longstanding rule of strict scrutiny applicable to governmental classifications based on religion.

D. The Constitution Protects Religious Institutions From Discrimination Just As It Protects Individual Believers.

Missouri's exclusion of Trinity Lutheran from its Scrap Tire Program breaches the fundamental constitutional norm of religious equality. Trinity Lutheran met every neutral criterion for a subsidy to improve its school playground, ranking fifth in the state in the year it applied. Pet. App. 3a. It lost that subsidy only because of the school's affiliation with a church. *Id.* at 152a–153a. A more straightforward case of religious discrimination would be hard to find.

Under the Free Exercise Clause, it makes no difference that Trinity Lutheran is an organization rather than an individual believer. Religious organizations have First Amendment rights, too. *E.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694 (2012). If this case involved an individual believer, rather than a school, the discriminatory character of Missouri's decision would be easy to see. Suppose that Missouri provided recycled tires to qualifying individuals to resurface their driveways, but excluded anyone who belonged to a church. No court in the country would hesitate in concluding that strict scrutiny applied. See *Everson*, 330 U.S. at 16.

The same exacting standard applies to Missouri's exclusion of Trinity Lutheran. Discrimination against religions institutions does not, under this Court's precedents, receive lesser scrutiny than discrimina-

tion against individual believers. Religious institutions may implicate different governmental interests than do individual believers, but those interests are properly accounted for when assessing whether an asserted governmental interest is compelling—not in determining whether the state has engaged in religious discrimination triggering strict scrutiny. Cf. *FEC* v. *Beaumont*, 539 U.S. 146, 162 (2003) ("the time to consider" the tailoring of a policy to governmental interests "is when applying scrutiny at the level selected, not in selecting the standard of review itself"). And, as discussed below, Missouri has no legitimate, let alone compelling, interest in excluding Trinity Lutheran or other religious schools from the Scrap Tire Program based on their religious status.

II. NO COMPELLING, OR EVEN LEGITIMATE, GOVERNMENTAL INTEREST JUSTIFIES THE DISCRIMINATORY EXCLUSION OF TRINITY LUTHERAN FROM MISSOURI'S SCRAP TIRE PROGRAM.

Missouri's exclusion of Trinity Lutheran from the Scrap Tire Program, a rare instance of overt discrimination against religion, cannot withstand strict scrutiny. Subsidizing the resurfacing of a religious school's playground with recycled rubber would not offend the Establishment Clause. And absent an actual Establishment Clause violation that it is attempting to avoid, Missouri lacks a compelling state interest that could justify religious discrimination.

Even if a lower level of scrutiny applied, Missouri has no interest comparable to the "historic and substantial" state interest in *Locke* in declining to fund the training of ministers. Because the Scrap Tire Program is available to a wide range of nonreligious recipients, and because a rubber playground surface cannot be used to advance religion, any asserted an-

tiestablishment interest here is, at best, "negligible." Pet. App. 29a (Gruender, J., dissenting). Negligible establishment concerns cannot justify religious discrimination that violates the Free Exercise Clause.

A. Including Trinity Lutheran In The Scrap Tire Program Would Not Violate The Establishment Clause.

Missouri cannot justify its religious discrimination as necessary to comply with the Establishment Clause. As every member of the Eighth Circuit panel correctly recognized, "Missouri could include the Learning Center's playground in a nondiscriminatory Scrap Tire grant program without violating the Establishment Clause." Pet. App. 9a.

Agostini v. *Felton*, 521 U.S. 203 (1997), sets forth the criteria for determining whether including religious schools in a public aid program is consistent with the Establishment Clause. In *Agostini*, this Court rejected the rule that "all government aid that directly assists the educational function of religious schools is invalid." *Id.* at 225. Instead, such aid is consistent with the Establishment Clause so long as it has a secular purpose and does not have the primary effect of advancing or inhibiting religion. *Id.* at 222–23; *accord Mitchell* v. *Helms*, 530 U.S. 793, 807 (2000) (plurality). The Court further clarified that government aid to religious schools does not have the primary effect of advancing religion if it does not result in "governmental indoctrination" of religion; does not "define its recipients by reference to religion"; and does not "create an excessive entanglement" between church and state. *Agostini*, 521 U.S. at 234.

These criteria are easily satisfied here. It is undisputed that Missouri's Scrap Tire Program has a secular purpose by offering grants "to qualifying organiza-

tions for the purchase of recycled tires to resurface playgrounds, a beneficial reuse of this solid waste." Pet. App. 2a–3a (citing Mo. Rev. Stat. §§ 260.335.1, .273.6(2)). Subsidizing the resurfacing of playgrounds with reused rubber has the thoroughly secular purposes of protecting the safety of schoolchildren while reducing the environmental and safety hazards associated with disposing of used tires in landfills.

Likewise, including Trinity Lutheran in the Scrap Tire Program would not impermissibly advance religion. Providing recycled rubber to resurface Trinity Lutheran's playground would result in no government-sponsored religious indoctrination; accepting the subsidy would merely obligate Trinity Lutheran "to promote the Scrap Tire Program and educate the public about the benefits of recycling." Pet. App. 38a. The program awards subsidies based on criteria that have no reference to religion—except as a discriminatory, post-application disqualification. And allowing religious schools to participate in the program on equal terms with others would not result in excessive entanglement. Neither the "administrative cooperation" necessary for a short-term contractual relationship nor any purported "dangers of political divisiveness" would create an excessive church-state entanglement. *Agostini*, 521 U.S. at 233–34 ("Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two.") (citation omitted).

Missouri, in short, need not single out religious institutions for exclusion to satisfy the Establishment Clause. States do not offend the Establishment Clause when "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.*

at 231. See, *e.g.*, *Mitchell*, 530 U.S. 793 (upholding federal funding program providing a variety of educational materials for schools, including media and reference materials and computer software and hardware); *Agostini*, 521 U.S. 203 (upholding federal program providing remedial teaching to disadvantaged children on the premises of religious schools); *Everson*, 330 U.S. 1 (upholding state law funding bus transportation for public and religious schools).

B. Missouri Cannot Justify Its Religious Discrimination Based On An Interest In Church-State Separation Beyond What The Establishment Clause Requires.

1. Because including Trinity Lutheran in the Scrap Tire Program would not violate the Establishment Clause, Missouri lacks any compelling interest necessary to justify its religious discrimination. While the Court has said that an interest in avoiding an *actual* Establishment Clause violation "may be characterized as compelling," *Good News Club*, 533 U.S. at 112, the Court has never approved as compelling an interest in separating church and state beyond what the Establishment Clause requires.

Absent a "valid Establishment Clause claim," *id.* at 120, the Court has consistently held that government may not discriminate against religious groups in the name of church-state separation, *e.g.*, *id.* at 112–19; *Rosenberger*, 515 U.S. at 837–46; *Lamb's Chapel*, 508 U.S. at 394–97; *Widmar*, 454 U.S. at 270–76. In *Widmar*, the Court expressly held that a state's asserted interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause" was not "sufficiently 'compelling' to justify content-based discrimination against ... religious speech." 454 U.S. at 276. It is likewise insufficient to justify Missouri's overt dis-

crimination against religious institutions in its Scrap Tire Program. See *McDaniel*, 435 U.S. at 628–29 (plurality) (antiestablishment interests did not justify Tennessee's clergy-disqualification provision).

Nor did *Locke* rule that a prophylactic interest in church-state separation was a compelling interest that meets the exacting demands of strict scrutiny. *Locke* declined to apply strict scrutiny. See 540 U.S. at 720 (rejecting Davey's "claim of presumptive unconstitutionality"). And the Court never characterized Washington's interest in not funding the training of clergy as "compelling." Because *Locke* did not apply strict scrutiny, it offers no support for Missouri's claim that an interest in church-state separation beyond what the Establishment Clause requires is sufficiently compelling to excuse religious discrimination. See *Lukumi*, 508 U.S. at 546 ("A law that targets religious conduct for distinctive treatment ... will survive strict scrutiny only in rare cases.").

2. Even if a lower level of scrutiny applied, *Locke* still would not validate Missouri's exclusion of Trinity Lutheran from the Scrap Tire Program. *Locke* did not hold that every asserted interest in church-state separation can justify the blanket exclusion of religious individuals and groups from public aid programs. Rather, the Court focused narrowly on "the historic and substantial state interest" in avoiding public funding of "the religious training of clergy," which the Court emphasized was "the only interest at issue" in the case. 540 U.S. at 725, 722 n.5. And the Court expressly confirmed that "nothing in [its] opinion suggests that the State may justify any interest that its 'philosophical preference' commands." *Id.* at 722 n.5.

Missouri's "philosophical preference" for excluding religious institutions from public benefit programs is supported by nothing like the substantial and histori-

cally rooted constitutional objections to public funding for the training of clergy. Needless to say, Madison wrote no *Memorial and Remonstrance* against the government donating recycled tires to religious schools, on equal terms with nonreligious schools, to resurface their playgrounds. Nor is there a historical tradition supporting the exclusion of religious institutions from public aid programs. Quite to the contrary, the Nation has a "long tradition of allowing religious adherents to participate on equal terms in neutral government programs." *Rosenberger*, 515 U.S. at 852–53 (Thomas, J., concurring). That tradition stretches as far back as the Northwest Ordinance of 1787, under which Congress set aside federal lands for use by schools—including church-affiliated schools. *Id.* at 862–63; see also *Bowen* v. *Kendrick*, 487 U.S. 589, 609 (1988) (noting the "long history of cooperation and interdependency between governments and charitable or religious organizations").

Missouri's preference for greater church-state separation gets no boost merely because it is embodied in the state constitution rather than a statute or policy. See *McDaniel*, 435 U.S. at 621; *Torcaso*, 367 U.S. at 495. A state's interest in promoting the separation of church and state under its own constitution is necessarily limited by its overriding duty to comply with the federal Constitution. See *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940); *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943).

3. The courts below tried to equate this case with *Locke* by contending that the state has a substantial interest in avoiding "the direct expenditure of public funds to aid a church." Pet. App. 12a n.3; see *id.* at 54a ("the direct payment of government funds to a religious institution" raises "antiestablishment concerns that are at least comparable to those relied on

by the Court in *Locke*"). This reasoning is deeply flawed. Subsidizing the use of recycled tires to resurface a school playground is about as far removed as possible from *Locke*'s historic concern with the use of tax money for the training of professional ministers.

There is, for example, no merit to the claim that a grant to Trinity Lutheran under the Scrap Tire Program would pose "special Establishment Clause dangers" simply because it would involve a "direct money paymen[t] to [a] sectarian institutio[n]." Pet. App. 54a. The grant merely reimburses the recipient for the cost of purchasing recycled tires; it is in substance an in-kind contribution, not an unrestricted grant of money. Nothing of constitutional magnitude turns on whether the government purchases the tires itself and donates them to the school or instead reimburses the school for the cost of the tires. See *Comm. for Pub. Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 658 (1980) (rejecting a "formalistic dichotomy" that would invalidate "reimbursements simply because they involve payments in cash").

"Nor does it matter that, by providing funds for [recycled tires], the agency may have freed up the recipients' resources for other activities." *Am. Atheists, Inc.* v. *City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 296–97 (6th Cir. 2009) (Sutton, J.). This Court has repeatedly rejected "the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Regan*, 444 U.S. at 658. Moreover, it may well be that without a grant, some religious schools would be unable to resurface their playgrounds. In that event, the grant would not "free up" any funds; it would simply allow the school to make the state's desired secular improvement—a safer, more environmentally friendly playground.

Likewise, it does not matter that the grant flows directly to the school rather than passing through private hands. "The Court has sustained a number of neutral aid programs that distributed aid directly to religious organizations—without filtering the aid through private choice—where the aid itself had no religious content and any actual diversion was de minimis." *Am. Atheists*, 567 F.3d at 295. *E.g.*, *Regan*, 444 U.S. 646; *Hunt* v. *McNair*, 413 U.S. 734 (1973); *Roemer* v. *Bd. of Pub. Works*, 426 U.S. 736 (1976); *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Bradfield* v. *Roberts*, 175 U.S. 291 (1899). This case falls squarely within this long line of precedent.

Indeed, this case should be easy because there is "no substantial risk that [recycled tires] could be used for religious educational purposes." *Regan*, 444 U.S. at 656. Recycled tires have no religious content and cannot be diverted for religious purposes. Under any view of the Establishment Clause, such "aid of a secular character with no discernible benefit to ... a sectarian objective is allowable." *Mitchell*, 530 U.S. at 868 (Souter, J., dissenting). As Judge Gruender aptly put it below, "schoolchildren playing on a safer rubber surface made from environmentally-friendly recycled tires has nothing to do with religion." Pet. App. 29a (dissenting op.); cf. *Am. Atheists*, 567 F.3d at 293 ("Unlike a teacher, a sign-language interpreter or even an overhead projector—all of which conceivably can be used to communicate secular *and* religious messages—a brick, gutter or bush (unless burning) cannot be coopted to convey a religious message").[4]

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[4] Because resurfacing a playground does not advance religion, the Court need not reach the question whether a state may exclude religious institutions from public aid programs that provide benefits that could be used for religious ends.

In short, when state aid cannot be used to fund religious activities, this Court has repeatedly held that "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer*, 426 U.S. at 746. Otherwise "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Id.* at 747. "The Court never has held that religious activities must"—or even may—"be discriminated against in this way." *Id.* Missouri has no legitimate antiestablishment interest in excluding Trinity Lutheran from the Scrap Tire Program. Absent such an interest, the decision below should be reversed, regardless of the level of scrutiny this Court applies.

III. FAILING TO ENFORCE THE PRINCIPLE AGAINST RELIGIOUS DISCRIMINATION WOULD THREATEN LASTING INJURIES TO RELIGIOUS INSTITUTIONS.

A. Excluding Religious Institutions From Public Benefit Programs Harms Both The Institutions And Those They Serve.

The consequences of condoning Missouri's discriminatory exclusion of Trinity Lutheran could be devastating—not only for religious believers, but also for the disadvantaged individuals and communities they serve. The United States has a proud tradition of encouraging secular social-services ventures between government and religious organizations. That "long history of cooperation and interdependency," *Bowen*, 487 U.S. at 609, has led this Court to reject Establishment Clause challenges to religious groups' participation in public programs. Indeed, "this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Id.*

Congress has likewise recognized that "[c]haritable organizations with religious affiliations historically have provided social services with the support of their communities and without controversy." *Id.* (quoting S. Rep. No. 98-496, at 10 (1984)). The ecumenical Christian organization Habitat for Humanity, for example, has leveraged government funding to help millions of people build and own their homes. See Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834, 841–45, § 11. Many religiously affiliated hospitals rely on state funding as providers of last resort for underinsured and medically needy patients. See, *e.g.*, J. David Seay, Catholic Health Ass'n, *Beyond Charity Care* 9 (2007). And states implementing the federal Temporary Assistance to Needy Families program contract with religious organizations to deliver housing, rehabilitation, and food assistance to the underprivileged. See, *e.g.*, 42 U.S.C. § 604a.

These and countless other faith-based organizations deliver essential services to marginalized and at-risk individuals and communities, while simultaneously alleviating the government's burden of delivering aid. Under the rule adopted below, however, religious institutions would have no constitutional protection against being excluded from these programs solely because of their religious status. If Missouri can deny Trinity Lutheran access to playground rubber because of its religious affiliation, then states could deny funding to Habitat for Humanity or a church-run Meals on Wheels service on the same discriminatory basis. Such a result would be untrue to our national tradition and would inflict a palpable injury on both religious institutions and the many Americans who rely on them to deliver vital social services.

B. Religious Discrimination Demeans Religious Believers And Institutions.

Religious organizations and their secular counterparts in Missouri do not participate equally in government benefit programs. The state openly discriminates against religious institutions. Indeed, the opinion below acknowledged the breadth of Missouri's disapproval of "church participation in a host of publicly-funded programs." Pet. App. 11a.

But pervasive religious discrimination is no more acceptable than targeted religious discrimination. Denying believers and their religious institutions the same rights and privileges available to nonreligious persons and their institutions sends the powerful and demeaning message that people of faith are second-class citizens: "Believers need not apply." Permitting such official discrimination against religion would "license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Bd. of Educ.* v. *Mergens*, 496 U.S. 226, 248 (1990) (plurality) (quoting *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in judgment)). Including churches on equal terms with secular groups in generally available public benefit programs conveys no governmental endorsement of religion. Excluding them, by contrast, "send[s] a far stronger message—a message not of endorsement but of disapproval." *Am. Atheists*, 567 F.3d at 292.

This message is a deep affront to the dignity of the many millions of Americans for whom religion is central to their identity and way of life. See *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). For such believers, religious duty is "precedent, both in order of time and in degree of obligation, to the claims of Civil Society."

James Madison, *Memorial and Remonstrance Against Religious Assessments, in James Madison: Writings* 29, 30 (Jack N. Rakove ed., 1999). The Founders reconciled the twin demands of faith and country in the First Amendment's Religion Clauses: the state may not establish religion, nor may any person be "restricted or demeaned by government in exercising his or her religion." *Burwell*, 134 S. Ct. at 2786 (Kennedy, J., concurring). This Court's precedents have long honored that principle, treating religious discrimination as no less stigmatizing and no more tolerable than other forms of invidious discrimination. *E.g.*, *Carolene Prods.*, 304 U.S. at 153 n.4.

Rather than respecting the constitutional commitment to equal treatment of religious observers, the decision below transforms the administration of government benefits into a potent weapon against religion. Armed with the no-aid-to-religion principle, government officials could abuse the power to administer benefits to suppress or penalize religious organizations whose beliefs or practices are politically disfavored. While this Court has properly rejected such viewpoint discrimination, see *Rosenberger*, 515 U.S. at 829, under the holding below a policy broadly excluding all religious organizations from a category of benefits could fall with calculated force on a targeted religious organization if it is the only, or one of a few, religious groups participating in that government program. A state or municipality where Catholic Charities is the only religious adoption agency, for instance, could penalize it for its religious practices under the guise of withholding public funding from *all* religious adoption agencies.

No express connection between the disfavored religious practice and the denied government benefits would be necessary. And nothing in the decision be-

low cabins its tolerance for religious discrimination to comprehensive or constitutional exclusions; individual civil servants could likewise exercise their discretion to exclude religious institutions for reasons like those Missouri advances here. A bureaucrat irritated because of a church's support for expansive immigration policies could penalize the church by disqualifying all religious groups from a category of government benefits under the guise of advancing church-state separation. Amorphous and unsubstantiated Establishment Clause concerns would thus offer a shield for targeted "disabilities on the basis of religion." *Lukumi*, 508 U.S. at 557 (Scalia, J., concurring). Such an assault on religious liberty would unmistakably violate the Free Exercise Clause, which "protects against governmental hostility which is masked as well as overt." *Id.* at 534.

Whatever Missouri's intent, its exclusion of Trinity Lutheran from an otherwise neutral, secular aid program based solely on its religious status suggests that the state "disapprove[s] of a particular religion or of religion in general." *Id.* at 532. But in our constitutional tradition, religious people and institutions are not second-class citizens, and freedom of religion under the First Amendment is not a second-class right. As with any other suspect classification, Missouri's religious discrimination is unlawful and cannot be upheld unless it is necessary to serve a compelling governmental interest. Because there is no legitimate, let alone compelling, reason to exclude religious schools from the Scrap Tire Program, the denial of Trinity Lutheran's application violated its constitutional right to the free exercise of religion.

CONCLUSION

For these reasons, the Court should hold that Missouri may not exclude Trinity Lutheran from the Scrap Tire Program based on its religious status and reverse the judgment below.

Respectfully submitted,

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In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, in her official capacity,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF *AMICUS CURIAE* OF WALLBUILDERS, INC. in support of the Petitioner and urging reversal

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INTEREST OF *AMICUS CURIAE*[1]

WallBuilders, Inc., is a non-profit organization that is dedicated to the restoration of the moral and religious foundation upon which America was built. WallBuilders' President, David Barton, is a recognized authority on American history and on the role of religion in public life. As a result of his expertise in these areas, he works as a consultant to national history textbook publishers. He has been appointed by the State Boards of Education in states such as California and Texas to help write the American history and government standards for students in those states. Mr. Barton also consults with Governors and State Boards of Education in several states, and he has testified in numerous state legislatures on American history. Much of his knowledge is gained through WallBuilders' vast collection of rare, primary documents of American history, including more than 70,000 documents predating 1812.

Furthermore, WallBuilders encourages citizens all across America to continue the tradition of bringing religious perspectives to bear in public life. WallBuilders and its constituents desire to see religion treated as the Framers of the First Amendment intended and seek to clarify what the establishment of

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[1] Counsel of Record for Petitioner has consented to this filing through a blanket letter of consent lodged with this Court. Counsel of Record for Respondent has consented through a letter enclosed with this Brief. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amicus Curiae*, and its counsel.

religion really means.

SUMMARY OF THE ARGUMENT

Under *Widmar v. Vincent*, 454 U.S. 263, 276 (1981), the heightened antiestablishment provisions of Missouri's Constitution are constrained by the federal constitution's free exercise protections. Furthermore, federal antiestablishment concerns are not implicated by Missouri's Scrap Tire Grant Program. Thus, the Eighth Circuit's contrary conclusion is based on an invocation this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), that ignores the true principles that animated the Framers' views of church-state relations.

Therefore, this Brief will first examine the Framers' understanding of the establishment of religion. Specifically, the Framers distinguished four concepts: the acknowledgment of religion, the accommodation of religion, the encouragement of religion, and the establishment of religion. In balancing the rights of the religious majority with the rights of religious minorities, the Framers allowed the acknowledgment of religion, the accommodation of religion, and the encouragement of religion; only the establishment of religion was barred.

The Brief will then demonstrate how those concepts have survived in this Court's modern-day Establishment Clause jurisprudence. An application of those concepts demonstrates that the Scrap Tire Grant Program may not even implicate the concepts of acknowledgment, accommodation, and encouragement, and most certainly does protect against an establishment of religion. Indeed, the Scrap Tire Grant Program is the type of program about which Justice Jackson wrote in 1947, "it [is] pretty plain that such a

scheme would not be valid." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 26 (1947) (Jackson, J., dissenting).

Justice Jackson's 1947 laughable strawman is today's straight-faced enactment. This Court should reverse the Eight Circuit's judgment and declare the Scrap Tire Grant Program unconstitutional as applied to Trinity Lutheran Church.

ARGUMENT

I. NEITHER MISSOURI NOR FEDERAL CONSTITUTIONAL ANTIESTABLISHMENT CONCERNS JUSTIFY EXCLUDING TRINITY LUTHERAN FROM THE SCRAP TIRE GRANT PROGRAM.

As Trinity Lutheran Church has argued, the Eighth Circuit, in affirming the District Court, erred in rejecting Trinity Lutheran's Free Exercise claim. Pet'r Br 10-11. Of special significance is the fact that, as Trinity has also argued, this Court has already held that an antiestablishment concerns raised by Missouri's desire to meet the higher safeguards of its own constitution's No-aid Clause must be addressed without violating the federal Free Exercise Clause: "'the state interest asserted here—in achieving greater separation of church and state than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause.'" Pet'r Br 30 (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Thus, Missouri's invocation of its *heightened* antiestablishment concerns has already been rejected by this Court in the context of as-applied Free Exercise (and Equal Protection) claims. *Widmar* at 283-84 (White, J., dissenting); *id.* at 266.

However, it is important to note that *federal* antiestablishment concerns cannot justify Trinity Lutheran's exclusion from the Scrap Tire Grant Program either. These reasons this is so are grounded in history. Given the Eighth Circuit's attention, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 785 (8th Cir. 2015), to this Court's discussion of Establishment Clause history and "hallmarks of an established religion" in *Locke v. Davey*, 540 U.S. 712 (2004), it is the purpose of this Brief to set the relevant historical concepts and to show how they have survived in this Court's current establishment Clause jurisdiction. In so doing, this Brief will demonstrate that, as just stated, the Scrap Tire Grant Program raises no antiestablishment concerns.

A. A Proper Understanding of the Establishment Clause Protects the Rights of the Majority and the Minority.

One of the animating principles of the Framers' political theory was a concern to balance the rights of the majority and minority in any given situation. For the Framers, this balancing of the rights of the majority and the minority should never be a matter of "either/or"; it must always be a matter of "both/and." Thus, *The Federalist Papers* reflect the concern about the tyranny of the majority over the minority. For example, in *Federalist 51* one reads, "[i]f a majority be united by common interest, the rights of the minority will be insecure." *The Federalist* No. 51, at 161 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981). However, *The Federalist* was equally, if not more, concerned about the tyranny of the minority over the majority. For example, in *Federalist 22*, one reads that the "fun-

damental maxim of republican government . . . requires that the sense of the majority should prevail." *The Federalist* No. 22, at 52 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981). The only exception would be if that sense violated the constitutional protection put in place to protect the minority.

The federal Free Exercise and Establishment Clauses show how this balance was achieved in the area of religion. The Framers struck their balance by distinguishing four concepts: the acknowledgment of religion, the accommodation of religion, the encouragement of religion, and the establishment of religion. In deciding how to balance the rights of, and protect against the tyranny of, majorities and minorities, the Framers determined that acknowledgment, accommodation, and encouragement of religion would be permitted and that only establishment would be forbidden. And as the following sections will demonstrate, it is clear that the Scrap Tire Grant Program does not establish religion.

B. True Establishment of Religion is Prohibited.

It is important to remember what the original concept of establishment was all about. The Framers were actually aware of three different ways in which religion could be established, as explained by Justice Joseph Story:

> One, where a government affords aid to a particular religion, leaving all persons free to adopt any other; another, where it creates an ecclesiastical establishment for the propagation of the doctrines of a particular sect of that religion, leaving a like freedom to all others; and a third, where it

> creates such an establishment, and excludes all persons, not belonging to it, either wholly, or in part, from any participation in the public honours, trusts, emoluments, privileges, and immunities of the state.

Joseph Story, *Commentaries on the Constitution of the United States* § 1866 (Arthur E. Sutherland ed. 1970) (1833).

With such a definition in mind, it is easier to distinguish acknowledgment, accommodation, and encouragement on the one hand from establishment on the other hand. Although some of the historical examples of acknowledgment, accommodation, and encouragement do not directly parallel the facts of the instant case, it is important to obtain a fairly full-orbed view of these concepts.[2] This Brief will look at each in turn.

C. Acknowledgment of Religion is Permitted.

One of the most historically accurate explications of the meaning of the Establishment Clause is contained in then-Justice Rehnquist's dissent in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist,

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[2] Further, some of these examples will contain fairly long quotations. These are included to several purposes: to be honest with the primary sources, to give a sense of just how persuasive religious rhetoric and actions were in the founding era (and to give a "flavor" of the former), and to demonstrate by comparison just how far removed the Scrap Tire Grant Program is from a true establishment of religion and likely even from the permitted relationships with the state of acknowledgment, accommodation, and encouragement.

J., dissenting). There one reads the following:

> On the day after the House of Representatives voted to adopt the form of the First Amendment Religion Clauses which was ultimately proposed and ratified, Representative Elias Boudinot proposed a resolution asking President George Washington to issue a Thanksgiving Day Proclamation. Boudinot said he "could not think of letting the session pass over without offering an opportunity to all the citizens the United States of joining with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them."

Id. at 100-01 (Rehnquist, J., dissenting) (*citing and quoting* 1 Annals of Cong. 914 (1789)). Justice Rehnquist then documented some of the debate over the resolution, including objections on what today would be called establishment grounds. *Id.* at 101 (Rehnquist, J., dissenting). This shows that the First Congress did not simply engage in inconsistent action. Rather, they heard the minority view and rejected it.

Justice Rehnquist then described some of the final language of the Joint Resolution and quoted the Thanksgiving proclamation ultimately issued by President Washington:

> Within two weeks of this action by the House, George Washington responded to the Joint Resolution which by now had been changed to include the language that the President "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them

an opportunity peaceably to establish a form of government for their safety and happiness." The Presidential Proclamation was couched in these words:

> Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquillity, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.
>
> And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our sev-

> eral and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed; to protect and guide all sovereigns and nations (especially such as have shown kindness to us), and to bless them with good governments, peace, and concord; to promote the knowledge and practice of true religion and virtue, and the increase of science among them and us; and, generally, to grant unto all mankind such a degree of temporal prosperity as He alone knows to be best.

Id. at 101-03 (Rehnquist, J., dissenting) (*citing and quoting* 1 J. Richardson, Messages and Papers of the Presidents, 1789-1897, at 64 (1897)). The opening words of this same Thanksgiving Proclamation are these: "Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor . . . ." http://avalon.law.yale.edu/18th_century/gwproc01.asp (last visited Apr. 18, 2016).

Justice Rehnquist also noted the views of the eminent constitutional authority, Thomas Cooley:

> But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever

> may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving his boundless favors, or bowing in contrition when visited with the penalties of his broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government. Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse . . . .

Thomas Cooley, *Treatise on the Constitutional Which Rest Upon the Legislative Power of the States of American Union*, 470-71 (1868) (quoted in *Wallace*, 472 U.S. at 105-06 (Rehnquist, J., dissenting)). Here Cooley was addressing the acknowledgment of God Himself, which is in fact, what Washington had done. It naturally follows that if government can acknowledge God, it can acknowledge religion; and Justice Rehnquist went on to quote Cooley's discussion of the "public recognition of religious worship." *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting) (citation omitted).[3]

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[3] This same quotation from Cooley also supports the concept of encouragement that this Brief will address below.

In sum, acknowledgment is not a hard concept. It meant then exactly what it means now—to recognize. Government can recognize the reality of God and the importance of religion. Ironically, in the instant case, Missouri has "recognized" Trinity Lutheran's religious status in order to discriminate against it.

D. Accommodation of Religion is Permitted.

Government can go a step beyond acknowledging religion. It may accommodate various sects' religious views and acts. This approach was discussed by George Washington. "[I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit." Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), *in George Washington on Religious Liberty and Mutual Understanding* 11 (E. Humphrey ed. 1932).

Importantly, this very passage was quoted by Justice O'Connor in her dissent in *City of Boerne v. Flores*. 521 U.S. 507, 562 (1997) (O'Connor, J., dissenting). In *Flores*, Justices O'Connor and Scalia debated whether Washington's sentiment and similar sentiments expressed during the colonial and early national period demonstrate that accommodation is constitutionally *required*. *Cf. id.* at 560-64 (O'Connor, J., dissenting) with *id.* at 541-44 (Scalia, J., concurring in part). Significantly, that debate is not implicated by the instant case. Rather, Justices O'Connor and Scalia's point of agreement is implicated here: many

historic practices that continue to the present day constitute an accommodation of religion and such accommodation is constitutionally *permitted*. These practices include exemptions from military service and exemptions from oath taking, among others. *Id.* at 560-64 (O'Connor, J., dissenting); *id.* at 541-44 (Scalia, J., concurring in part).

But these accommodations can also involve proactively providing services and opportunities. Classic examples include military, prison, and legislative chaplains.

Like acknowledgment, accommodation is not a hard concept. It simply means that the government changes what it otherwise might do, whether by granting exceptions or providing services that take into account the religious needs of the people. Arguably, accommodation is implicated by the instant case. While some parents may send their children to Trinity Lutheran's Learning Center because it is convenient or because they have heard good things about it, others many send their children their because they have religious convictions that cause them to seek a Christian or a specifically Lutheran environment for daycare or pre-school. Missouri can accommodate those religious convictions by allowing Trinity Lutheran the same access to the Scrap Tire Grant Program as it allows to non-church related daycares and pre-schools.

E. Encouragement of Religion is Permitted.

Governments can go yet further and encourage religion. Probably the most famous articulation of the encouragement principle is that found in the Northwest Ordinance, which states: "Religion, morality, and knowledge, being necessary to good government and

the happiness of mankind, schools and the means of education shall forever be encouraged." http://www.earlyamerica.com/text-northwest-ordinance/ (last visited Apr. 18, 2016).

However, the Founders and Framers did not just talk about encouraging religion; they actually did so. Here one can return to then-Justice Rehnquist's *Wallace v. Jaffree* dissent. There he noted that

> [a]s the United States moved from the 18th into the 19th century, Congress appropriated time and again public moneys in support of sectarian Indian education carried on by religious organizations. Typical of these was Jefferson's treaty with the Kaskaskia Indians, which provided annual cash support for the Tribe's Roman Catholic priest and church. It was not until 1897, when aid to sectarian education for Indians had reached $500,000 annually, that Congress decided thereafter to cease appropriating money for education in sectarian schools. This history shows the fallacy of the notion found in *Everson* that "no tax in any amount" may be levied for religious activities in any form.

Wallace, 472 U.S. at 103-04 (Rehnquist, J., dissenting) (footnote and citations omitted).

Justice Rehnquist went on to note even more detail about Jefferson's treaty:

> The treaty stated in part: "*And whereas,* the greater part of said Tribe have been baptized and received into the Catholic church, to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion . . . [a]nd . . .

> three hundred dollars, to assist the said Tribe in the erection of a church." From 1789 to 1823 the United States Congress had provided a trust endowment of up to 12,000 acres of land "for the Society of the United Brethren, for propagating the Gospel among the Heathen." The Act creating this endowment was renewed periodically and the renewals were signed into law by Washington, Adams, and Jefferson. Congressional grants for the aid of religion were not limited to Indians. In 1787 Congress provided land to the Ohio Company, including acreage for the support of religion. This grant was reauthorized in 1792. In 1833 Congress authorized the State of Ohio to sell the land set aside for religion and use the proceeds "for the support of religion . . . and for no other use or purpose whatsoever . . . ."

Id. at 104 n.5 (Rehnquist, J., dissenting).

While this type of funding would not be permissible under the Missouri Constitution, this Brief has already noted that the *Missouri* restrictions cannot be applied in such a way as to trample Trinity Lutheran's Free Exercise rights. And one cannot imagine such actions, funding, and programs being upheld under this Court's modern jurisprudence, no matter how much the Framers would disagree with that jurisprudence. But the point here is to demonstrate the sharp contrast between the Framers' concept of permissible encouragement and the innocuous program at issue in the instant case.

Encouragement goes beyond acknowledging God and religion. It goes beyond accommodating a religious sect's or individual's request for an accommo-

dation. It even goes beyond pro-actively extending accommodations without being asked. It involves looking for ways to encourage the citizenry to engage in religious pursuits. It certainly includes proclamations that encourage such actions. Sometimes the vehicle of encouragement will be one sect; sometimes a different one. The Framers truly believed that "[r]eligion, morality, and knowledge, [are] necessary to good government and the happiness of mankind . . . ." Therefore, government can—and should—encourage religion.

F. The Historic Concepts Persist in Modern Establishment Clause Jurisprudence.

Although current Establishment Clause jurisprudence has retreated far from some of these last examples, the "history lesson" just set forth is the foundation for an important reality: even though watered down, the concepts of acknowledgment, accommodation, and even encouragement still persist in this Court's Establishment Clause jurisprudence.

For example, the acknowledgment of both God and the role of religion in society continues to be addressed. In *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), this Court upheld Nebraska's legislative chaplaincy program. In so doing the Court noted that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not . . . an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792. And when this court revisited *Marsh* in *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014), it noted that the fact "[t]hat the First Congress provided for the ap-

pointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society."

This principle was reiterated in *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (plurality), when Chief Justice Rehnquist quoted from the Court's earlier Establishment Clause case, *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984): "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."

Similarly, the concept of accommodation is alive and well in this Court's jurisprudence. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting), Chief Justice Roberts addressed a contemporary example of religious accommodation: "Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice." And this Court has frequent occasion to address Title VII's religious accommodation provisions. *See, e.g.*, practice *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1359 (2015). Religious accommodation was at the heart of the dispute over Patient Protection and Affordable Care Act's contraceptives mandate in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

Perhaps this Court's most well-known articulations of accommodation occur in *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) ("When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual

needs."); and in *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.").

And, of course, the accommodation quotation from *Zorach* also addresses encouragement: "When the state encourages religious instruction . . . it follows the best of our traditions." These words first appeared in *Zorach*, 343 U.S. at 313-14 (garnering the votes of Vinson, C.J., & Reed, Douglas, Burton, Clark, & Minton, JJ.). Since then the words have been quoted in whole or in part in eleven other Supreme Court opinions.[4]

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[4] *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (Rehnquist, C.J., writing for the plurality, joined by Scalia, Kennedy & Thomas, JJ.); *Board of Educ. v. Grumet*, 512 U.S. 687, 744 (1994) (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400-01 (1993) (Scalia & Thomas, JJ,, concurring); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, White & Scalia, JJ., & Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 554 (1986) (Burger, C.J., & White & Rehnquist, JJ., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring); *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Burger, C.J., concurring in the judgment in part and dissenting in part); *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Rehnquist & White, JJ., concurring in the judgment in part and dissenting in part); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 813 (1973) (White, J., dissenting, joined in part by Burger, C.J., & Rehnquist, J.) (opinion applying also to two consolidated cases); *Lemon v. Kurtzman*, 403 U.S. 602, 661 (1971) (White, J., concurring in two consolidated cases and dissenting in two consolidated cases); and *Walz v. Tax Com. of*

II. THE SCRAP TIRE GRANT PROGRAM DOES NOT IMPLICATE ANTIESTABLISHMENT CONCERNS; RATHER IT VIOLATES TRINITY LUTHERAN'S FREE EXERCISE AND EQUAL PROTECTION RIGHTS.

The point for the present case is obvious, but important: Wherever on the continuum from acknowledgment to accommodation to encouragement this Court might place the Scrap Tire Grant Program, the Program does not constitute establishment under the Framers' principles.

In fact, in some ways, it is hard to place the Program on the continuum. As noted the only recognition is negative "recognition." Further, and again as noted, an argument can be made that the program accommodates the religion of some, but that is a rather attenuated argument. And one could argue that the Program encourages religion. However, to make that argument, one would have to use the word "encourage" in a different sense than its historic use.

As demonstrated, historically, encouragement involved direct assistance to religion, often including financial assistance to whatever religious organization had "boots on the ground." However, such practices did not constitute an establishment of religion in that they did not reach even Justice Story's mildest form of establishment in which "a government affords aid to a particular religion, leaving all persons free to

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New York, 397 U.S. 664, 671 (1970) (Burger, C.J., & Black, Stewart, White, & Marshall, JJ.). All but Justice O'Connor's are positive invocations of this proposition. Justice O'Connor noted that the proposition was inapposite as used by appellants.

adopt any other." Joseph Story, *Commentaries on the Constitution of the United States* § 1866 (Arthur E. Sutherland ed. 1970) (1833).

By comparison, if one used the word "encourage" with regard to the Program, one would have to say something like, "If Trinity Lutheran receives a grant, it might encourage some parents to send their children to The Learning Center, and if the children go to The Learning Center, they might be exposed to religious teaching that they would not encounter anywhere else." This, of course, is nothing like the government helping to pay for priests or churches or endowing an evangelistic association because it believes religion is "necessary to good government."

In fact, these two different uses of the word "encourage" also help to show that no Establishment Clause concerns are present. This Court has already rejected the argument that parents being encouraged to send their children to religious schools implicates antiestablishment concerns. Significantly, the argument was rejected in the context of a program designed to increase student safety, just as the Scrap Tire Grant Program is designed to do:

> [W]e cannot say that the First Amendment prohibits New Jersey from spending taxraised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. . . . Moreover, state-paid

> policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 17-18 (1947).[5]

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[5] Your *Amicus* is aware of the distinction between cases concerning whether a state *may* extend benefits and cases concerning whether a state *must* offer a benefit. However, Trinity Lutheran has ably briefed this distinction. More importantly, the point for which the above quotation is used is not lessened by this distinction.

Thus, this form of indirectly "encouraging" parents to send their children to a Catholic school—or here, Trinity Lutheran—raises no antiestablishment concerns. And, in turn, this Court relied on *Everson* in *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 747 (1976) for the proposition that "[i]f this [i.e., "incidental[ly] . . . facilitating religious activity"] were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way."

Bearing in mind that this is the analogy this Court's majority *did* employ in *Everson*—given the facts as it believed them to be—it is also instructive to note the objections to this analogy made by Justice Jackson, writing for the four dissenters. Justice Jackson saw the facts differently. He believed that the program allowed reimbursements to *only* those parents whose children were enrolled in public schools and Catholic parochial schools. *Id.* at 21 (Jackson, J., dissenting). Under this view, Justice Jackson criticized the analogy as follows:

> It seems to me that the basic fallacy in the Court's reasoning, which accounts for its failure to apply the principles it avows, is in ignoring the essentially religious test by which beneficiaries of this expenditure are selected. A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask be-

> fore he renders aid 'Is this man or building identified with the Catholic Church.' But before these school authorities draw a check to reimburse for a student's fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld. To consider the converse of the Court's reasoning will best disclose its fallacy. That there is no parallel between police and fire protection and this plan of reimbursement is apparent from the incongruity of the limitation of this Act if applied to police and fire service. Could we sustain an Act that said police shall protect pupils on the way to or from public schools and Catholic schools but not while going to and coming from other schools, and firemen shall extinguish a blaze in public or Catholic school buildings but shall not put out a blaze in Protestant Church schools or private schools operated for profit? That is the true analogy to the case we have before us and I should think it pretty plain that such a scheme would not be valid.

Id. at 25-26.

Thus, the *Everson* majority and the *Roemer* plurality teach that *where a program of aid is opened to all those similarly situated*, 1) there is no antiestablishment concern over indirectly "encouraging" parents to choose religious schools and 2) that absurd consequences result when the opposite stance is embraced. On the other hand, the *Everson* minority teaches that *when the program discriminates on the basis of religion*—which is exactly what the Scrap Tire Grant Program does—"it [is] pretty plain that such a scheme would not be valid." *Id.*

These are two sides of the same coin, but it is

helpful to see the Scrap Tire Grant Program for what it is. The laughable strawman has indeed become the straight-faced enactment.

This Court should "not sustain an Act," *id.*, that provides scrap rubber to "public school districts, private schools (depending on status), park districts, nonprofit day care centers, other nonprofit entities and governmental organizations other than state agencies"[6] but not to Trinity Lutheran's Learning Center's daycare and preschool.

CONCLUSION

For the foregoing reasons and for other reasons stated in Trinity Lutheran's Brief, this Court should reverse the judgment of the Eighth Circuit.

Respectfully submitted,
this 21st day of April, 2016,

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[6] Pet'r Br. 1a (*Missouri Department of Natural Resources Publication 2425*).

RECORD AND BRIEFS

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In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, DIRECTOR,
MISSOURI DEPARTMENT OF NATURAL RESOURCES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF WORLD VISION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether it is consistent with the Establishment Clause to let a day care center operated by a church get state funds for resurfacing its playground under an evenhanded and neutral aid program.

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INTEREST OF THE *AMICUS CURIAE*[1]

Since 1950, World Vision has been a Christian humanitarian organization dedicated to working with children, families, and their communities in nearly 100 countries to reach their full potential by tackling the causes of poverty and injustice. World Vision has a direct and substantial interest in the outcome of this case, as it competes for federal grants and has its headquarters in the State of Washington, whose state constitution contains a "Blaine Amendment."[2] World Vision is concerned that the decision below authorizes discrimination against religious institutions; and if the decision below is not corrected, such discrimination could extend far outside the narrow program involved in this case.

SUMMARY OF ARGUMENT

Trinity Lutheran correctly argues that Missouri's discrimination against religious institutions in the Scrap Tire Program should be subjected to strict scrutiny under *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993). But this still

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. The parties' counsel of record received timely notice of the intent to file the brief under Rule 37. All parties have consented to this filing.

[2] "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." Wash. Const. art. I, § 11.

leaves open the question whether the exclusion should pass strict scrutiny on the theory that (1) Missouri has a compelling interest in complying with the Establishment Clause, and (2) providing playground resurfacing grants to religious preschools would violate the Establishment Clause. This brief argues that the answer to this question is "no": allowing religious institutions equal access to Scrap Tire Program grants would not violate the Establishment Clause.

1. This Court ought to conclude that the Establishment Clause is not violated when religious organizations receive government funds under a neutral and evenhanded funding program. This rule, adopted by the plurality in *Mitchell* v. *Helms*, 530 U.S. 793 (2000), is a sensible device for dealing with the many government aid programs that exist today. As this case illustrates, reading the Establishment Clause to exclude religious organizations from such aid programs would wrongly deny the organizations equal access to the resources needed to protect the health and safety of their congregants (as well as of the general public who may use their facilities).

If the government reimbursed day care centers for removing potentially cancer-causing asbestos, or hired security guards for all day care centers in an attempt to prevent mass shootings, government funds would be going directly to improving health and safety. Distributed evenly to religious and secular organizations alike, these government funds would equally benefit all people. As a result, no one should conclude that these evenhanded health and safety programs would raise any Establishment Clause concerns.

Similarly, in this case, Missouri government funds are going to religious and secular nonprofit organizations to make playground surfaces safer. By protecting children from the hard, jagged edges of the gravel currently used in many playgrounds, resurfacing grants help improve the health and safety of both the day care children and the other neighborhood children who use these playground facilities. Such an evenhanded funding program that aims to protect the health and safety of young children around the state should not raise any Establishment Clause concerns.

2. Even if this Court decides this case under Justice O'Connor's and Justice Breyer's concurrence in *Mitchell* v. *Helms*, providing a grant to Trinity Lutheran would not violate the Establishment Clause. Grant funding under the Scrap Tire Program would not be divertible for use for religious purposes.

The aid in this case—reimbursement for installing a rubber playground surface—would only help protect children who fall down while playing on the playground. Most religious services are held indoors, not on playgrounds. But even the rare services held outdoors on a playground do not materially benefit from the rubberized surface. No religious service with which *amicus* is familiar involves children chasing each other on the playground, hanging from the monkey bars, or doing other things that benefit from the greater safety produced by rubberized playground surfaces. Rubberized surfaces protect children's health during secular play; they do not enable religious worship.

ARGUMENT

Trinity Lutheran's brief persuasively argues that, under *Lukumi Babalu*, exclusion of religious institutions from the Scrap Tire Program precisely because of their religiosity presumptively violates the Free Exercise Clause. This presumption can only be overcome by showing that the discrimination against religion is narrowly tailored to a compelling government interest. But while there is a compelling government interest in preventing violation of the Establishment Clause, excluding religious institutions is not narrowly tailored to that interest: including such institutions on the same terms as other institutions would be entirely consistent with the Establishment Clause.

I. This Court Should Adopt the Conclusion of the *Mitchell* v. *Helms* Plurality: Evenhanded Aid Does Not Violate the Establishment Clause

The *Mitchell* plurality concluded that if "the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose," then "any aid going to a religious recipient only has the effect of furthering that secular purpose." *Mitchell*, 530 U.S. at 810 (plurality opinion). Because the aid in *Mitchell* was made available to a "broad array of schools . . . without regard to their religious affiliation or lack thereof," the aid did not violate the Establishment Clause. *Id.* at 830.

In so concluding, the *Mitchell* plurality relied on a long line of this Court's precedents allowing reli-

gious institutions to benefit from neutral, evenhanded aid programs. *See id.* at 829. "[N]othing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it." *Id.* Similarly, in *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1, 8 (1993), this Court explained that "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."

Indeed, this Court's first modern Establishment Clause case stressed that a state should not be forbidden "from extending its general state law benefits to all its citizens without regard to their religious belief." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16 (1947). The Court in *Everson* noted that the First Amendment should not be construed to mandate denying state-funded "police and fire protection, connections for sewage disposal, public highways and sidewalks" to church-run schools. *Id.* at 17-18. Likewise, the First Amendment does not compel a state to exclude a religious day care center from a similar state-funded benefit "so separate and so indisputably marked off from the religious function" of this institution. *Id.* at 18. The First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Id.*

Distributing evenhanded aid to religious and secular organizations alike makes all the more sense in today's modern welfare state. Government funds

routinely go to help organizations improve the health and safety of their facilities, and religious institutions and their patrons should not be excluded from such help.

For instance, in the wake of Hurricane Sandy—the most destructive hurricane of the 2012 Atlantic hurricane season—the House of Representatives approved Federal Emergency Management Agency grants to help repair affected buildings, including houses of worship.[3] As the House of Representatives recognized, excluding churches, synagogues, mosques, and temples from receiving these funds would have unconscionably discriminated against religion.[4] Though FEMA appeared reluctant to provide even existing recovery funds to religious groups,[5] some funds ultimately did go to help restore electricity and housing at some religious institutions.[6] When natural disasters ravage a community, the govern-

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[3] Robert Pear, *House Approves Storm Aid for Religious Institutions*, N.Y. Times, Feb. 18, 2013.

[4] *Id.* ("To deny disaster relief to houses of worship devastated by the storm 'would be to discriminate against them because they are religious institutions,' [Representative Grace] Meng said."); Federal Disaster Assistance Nonprofit Fairness Act of 2013, H.R. 592, 113th Cong. (2013).

[5] Kevin Penton, *FEMA Denies Aid to Religious Groups Hit by Sandy*, USA Today, July 25, 2013.

[6] *Public Assistance Sandy Success Stories*, FEMA, https://www.fema.gov/public-assistance-sandy-success-stories (last updated Nov. 12, 2015) (reporting on aid to St. John's University, a Catholic college).

ment should be free to help all community institutions recover.

Likewise, following the Oklahoma City bombing, Congress provided funding to help nonprofit organizations rebuild from the blast. A church located near the bombed federal building sought "$12,000 from the Federal Emergency Management Agency to cover uninsured damages caused after the blast, when rescuers placed bloody bodies on the carpeted church floor and pitched tents in its newly resurfaced parking lot."[7] FEMA at first "refused by saying the aid would violate the constitutional separation of church and state," but later changed its mind under pressure from members of the Oklahoma Congressional delegation.[8] Holding that churches could not receive even-handed reconstruction aid would have left the church damaged—and damaged as a result of its willingness to help—while letting its next-door neighbor rebuild.

Likewise, if the government provides funding to stop the spread of the Ebola or Zika viruses, it should not be required to exclude religious organizations from receiving the funds. If, as the Court in *Everson* noted, the First Amendment does not mandate the denial of state-funded police and fire protection aimed at protecting citizens' health and safety, it should not deny any religious organization funding aimed at eradicating diseases, while permitting all

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[7] Laura Vozzella, *Aftermath Gives New Confidence to Oklahomans*, J. Rec. (Okla. City), Apr. 19, 1996.

[8] *Id.*

secular organizations to do so. *See Everson*, 330 U.S. at 17-18.

Missouri's Scrap Tire Program was the very sort of evenhanded program that the *Mitchell* plurality contemplated. It was open to playgrounds operated by religious and secular organizations alike. Indeed, thirteen recipients of the grant—all except Trinity Lutheran—were secular. And the criteria used to select grant recipients were neutral and secular, such as:

(1) whether the "[p]roject uses 100 percent scrap tires generated in Missouri" or "more than 40 percent scrap tires";

(2) whether the "project uses mats/tiles or pour-in-place surface material" or "loose surface material";

(3) whether the proposal includes three or more scrap tire material vendor quotes;

(4) whether the project has a realistic timeline; and

(5) whether the "school district's student population poverty percentage is greater than 75%."[9]

None of the criteria refers to religion, or even substantially opens the door to possible religious discrimination. Allowing churches to participate in this

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[9] *Playground Scrap Tire Surface Material Grant Application Instructions for Form 780-2143*, Mo. Dep't of Nat. Resources (Nov. 2015), http://dnr.mo.gov/pubs/pub2425.pdf [hereinafter *Application Instructions*].

program would thus not have violated the Establishment Clause.

II. Even Under the *Mitchell* v. *Helms* Concurrence, Trinity Church Is Not Barred from Receiving Grant Aid

Justice O'Connor's concurrence in *Mitchell*, joined by Justice Breyer, concluded that the even-handed funding in *Mitchell* was constitutional because the plaintiffs had not proven that the even-handedly allocated aid had been, was being, or was likely to be "used for religious purposes." *Mitchell*, 530 U.S. at 857, 867. "Regardless of whether these factors are constitutional requirements," the concurrence concluded, "they are surely sufficient to find that the program at issue here does not have the impermissible effect of advancing religion." *Id.* And the same is true of the Scrap Tire Program.

Under the Program, any grant recipient must first pay for the resurfacing out of pocket.[10] After that, the recipient may ask for reimbursement, but "solely for the purchase, vendor installation and delivery of playground scrap tire surface material."[11] Recipients are "reimbursed only after the playground scrap tire surface material is installed and verified by a department inspector and all required documentation is submitted and approved."[12]

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[10] *Application Instructions*, *supra* note 9.

[11] *Id.*

[12] *Id.*

And this reimbursement is unrelated to advancing religious worship. Most religious services are held indoors, not on a playground. The few held outdoors do not involve the activities for which rubberized surfaces are installed: children chasing each other on the playground or hanging from monkey bars. An outdoor service on a rubberized playground could just as effectively have been held on grass, gravel, or any other playground surface. The government funds would thus not be used for indoctrination or religious teachings.

Of course, like all aid, playground recipient grants might "free up" the recipient's resources to be used for religious purposes, or might make the recipient more attractive to families who are looking for a preschool for their children. But this Court "has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646, 658 (1980) (quoting *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973)).

The question instead is whether the government "aid in question actually is, or has been, used for religious purposes." *Mitchell*, 530 U.S. at 857 (O'Connor, J., concurring in the judgment) (upholding grants of instructional materials); *see also Zobrest*, 509 U.S. at 13-14 (upholding the government's decision to assist sectarian schools by providing interpreters to deaf students because the spending on the interpreter did not constitute spending on religious indoctrination); *Agostini* v. *Felton*, 521 U.S. 203 (1997) (upholding the government's program of providing supplementary secular instruction at religious schools because it did

not further religious indoctrination). The Scrap Tire Program assures that aid will not be used for religious purposes, or any purposes other than playground resurfacing. *See Regan*, 444 U.S. at 662 (holding that New York's reimbursement policy sufficiently ensured that sectarian schools were using funds for the costs of secular testing). Program funds are used to help protect children from physical injury, not to spread religious teachings.

For these reasons, this Court's decision in *Tilton* v. *Richardson*, 403 U.S. 672 (1971), does not support the conclusion that such a grant program is unconstitutional. In *Tilton*, this Court held that providing federal construction grants to religiously-affiliated colleges and universities for construction of secular facilities did not violate the Establishment Clause. *Id.* at 683-89. But this Court held that allowing grant recipients to start using the grant-financed facilities for religious purposes after 20 years was unconstitutional. *Id.* at 683-84.

Here, though, the reimbursement for installing scrap tire material does not create any new facility that could be used to advance religious interests, and does not make the existing facility (the playground) more suited for religious worship. Thus, grant aid will not have the "effect of advancing religion" that this Court rejected in *Tilton*. *Id.* at 683.

CONCLUSION

There is thus no Establishment Clause barrier to Trinity Lutheran receiving funds from Missouri's Scrap Tire Program, whether this Court adopts the view of the *Mitchell* plurality or of the concurrence.

Respectfully submitted,

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